Supreme Court, U.S.
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No. 06-513

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

GEORGE T. FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A habeas petitioner seeking to overcome the procedural default of a claim must show both "cause" and "prejudice" under *Wainwright v. Sykes*, 433 U.S. 72 (1977). Often, a petitioner seeks to use ineffective assistance of counsel to show "cause" under *Sykes*. To do so, he must show both deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The question presented is:

> Does a petitioner's showing of prejudice under *Strickland*, as part of meeting the "cause" prong of *Sykes*, automatically satisfy *Sykes*'s separate "prejudice" prong, or must a petitioner still independently show prejudice under *Sykes*?

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary. (Carl T. Anderson, Respondent-Appellee Below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held.)

The Respondent is George T. Franklin, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Marc C. Houk, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Franklin v. Anderson*, 434 F.3d 412 (6th Cir. 2006), is reproduced at App. 1a-36a. The Sixth Circuit's denial of rehearing en banc is reproduced at App. 37a. The Decision and Entry of the United States District Court for the Southern District of Ohio, 267 F. Supp. 2d 768 (S.D. Ohio 2003), is reproduced at App. 38a-87a. The Magistrate's Report and Recommendations is reproduced at App. 88a-341a. The Magistrate's Amended Supplemental Report and Recommendations is reproduced at App. 342a-355a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on January 9, 2006. The Sixth Circuit denied the Warden's petition for rehearing and suggestion for rehearing en banc on May 9, 2006. The Warden timely filed this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

INTRODUCTION

Most habeas petitions, and virtually all petitions in capital cases, include a claim of ineffective assistance of counsel. This case provides the Court an opportunity to resolve a conflict among the circuits that arises from the fact that such claims can play a dual role in habeas—serving either as a substantive claim for relief, or as a gateway to allow federal courts to consider otherwise defaulted claims. In particular, the circuits are split as to whether the showing of prejudice required under *Strickland v. Washington* to show

ineffective assistance as a substantive claim is also enough, in and of itself, to show the prejudice necessary under *Wainwright v. Sykes* to excuse procedural default. As more fully described below, this issue has particularly important ramifications for ineffective assistance of *appellate* counsel claims.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a claim of ineffective assistance can serve as a substantive basis for relief in habeas. To demonstrate ineffectiveness for this purpose, a petitioner must show both deficient performance and resulting prejudice. To show prejudice, a petitioner must show that there is a "reasonable probability" that, but for the deficient performance, the outcome of the hearing would have been different. If he makes such a showing, he is entitled to a new hearing with effective counsel. So, for example, if a petitioner received constitutionally ineffective assistance of appellate counsel, the petitioner is typically entitled to a new appeal in state court.

Separately, ineffective assistance can also serve as a "gateway" that allows federal courts in habeas to consider the merits of otherwise procedurally defaulted constitutional claims. That is, as a general matter, where a habeas petitioner has failed to present a claimed constitutional error in state court (as Franklin failed to present his ultimate claim here, a juror bias claim), the claim is deemed to be "procedurally defaulted," and the petitioner cannot rely on that error as a basis for habeas relief. Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), however, there is an exception to the general rule: if a petitioner can establish both "cause" and "prejudice," the federal court can overlook the procedural default and reach the merits of the otherwise-defaulted claim. In this procedural context, ineffective-assistance claims play a key role, as the Court has recognized that ineffectiveness of counsel can satisfy *Sykes*'s "cause" prong. In other words, a showing of "deficiency" and "prejudice," as *Strickland*

defines those terms, suffices to show "cause" for *Sykes* purposes.

The confusion among the circuits arises because *Sykes* also separately requires "prejudice," as part of the "cause" and "prejudice" formula. In other words, in relying on ineffectiveness to establish *Sykes* cause, petitioners must show *Strickland* prejudice, but *Sykes* itself *also* requires prejudice as a separate prong. The question then is whether *Sykes* prejudice requires an additional showing beyond *Strickland* prejudice. Some circuits, including the Sixth Circuit, treat the two as essentially identical. So if a petitioner establishes *Strickland* prejudice in showing ineffectiveness to meet *Sykes*'s cause prong, the court need not separately consider whether he also satisfies *Sykes*'s separate prejudice prong. Other circuits, recognizing that this would essentially eviscerate *Sykes*'s prejudice prong, insist that *Sykes* prejudice must logically require a higher showing than the *Strickland* prejudice relied upon to establish *Sykes* cause. Still other circuits have recognized that this is an open question, but have not resolved it.

This question is of particular importance where a petitioner is claiming ineffective assistance of *appellate* counsel. If the two prejudice requirements are separate, and the petitioner can meet only *Strickland* prejudice, then he should receive only a new appeal in the state court system with effective counsel. For those circuits that treat the two separate prejudice components as identical, however, the showing of *Strickland* prejudice (and hence *Sykes* prejudice) is enough to secure not only a new appeal, *but a new trial.* That is what happened here. The court below did not even consider the separate question of *Sykes* prejudice, but it instead used the prejudice component of Franklin's ineffective-assistance-of-appellate-counsel claim to order a *new trial.*

As this example demonstrates, the interaction of the two separate prejudice requirements is vitally important to the State's interests in the finality of its criminal judgments. Moreover, the circuits' differing treatment of prejudice in such cases means that as to those petitioners who advance claims of ineffectiveness assistance of appellate counsel, the remedy they receive—a new trial versus a new appeal—may turn solely on the circuit in which they reside.

The Warden thus respectfully asks the Court to grant his petition and address this important question.

STATEMENT OF THE CASE

A. Franklin murdered George Strauss while burglarizing Strauss's home.

On the morning of August 8, 1988, the badly beaten body of George Strauss was found in his townhouse in Cincinnati, Ohio. App. 96a. Investigators determined that several items were missing from the townhouse, including Strauss's money clip with several twenties, his credit cards, his watch, a VCR, a briefcase with personal papers, and a Marion brand claw hammer. In a wooded area a few blocks away, police found some of the items, including a bloodstained Marion brand claw hammer. The VCR, watch, and money were never recovered. App. 41a-42a.

The police immediately identified Franklin as a suspect, based on information implicating Franklin in another burglary committed in a similar fashion. Both crimes occurred in the same neighborhood, within seventeen days of each other. App. 95a-96a. Moreover, a latent fingerprint lifted from the champagne bottle in the townhouse matched those from Franklin's file. App. 96a.

Investigators learned that Franklin was with Michael Turnbolt earlier on the evening of Mr. Strauss's murder. Turnbolt later testified that both had been using drugs.

Franklin left at about 10:30 p.m., at which time he apparently had no money. Franklin returned and woke Turnbolt at about 2:30 a.m. App. 42a-43a. Franklin had $100 to $150 in ten- and twenty-dollar bills. Separately, Strauss's neighbor testified that she heard a horrible scream come from the direction of Strauss's condominium when she was out walking her dog at about 11:00 or 11:30 p.m. that night. App. 97a.

B. Franklin did not present his juror bias claim either at trial or during his direct appeal.

Franklin was eventually charged with aggravated murder and aggravated burglary, tried and convicted by a jury, and sentenced to death. App. 88a. Of particular importance here, during the jury selection process, his counsel did not object to seating Patricia Arthur (the juror who formed the basis for his jury bias claim in federal court) on the jury. Franklin appealed to the Ohio Court of Appeals, presenting six assignments of error. App. 98a-100a. His claimed errors did not include a juror bias claim. The Ohio Court of Appeals affirmed the convictions and sentence. App. 101a. Franklin then appealed to the Supreme Court of Ohio, reasserting the same six errors. App. 101a-104a. The Supreme Court of Ohio affirmed the judgment and, as required by statute, independently reviewed the circumstances of the case and determined that Franklin's death sentence was appropriate. App. 39a. That court denied Franklin's motion for rehearing, and this Court denied his petition for certiorari. App. 104a.

Franklin then moved the Ohio Supreme Court to reopen his case. He alleged that he had received deficient assistance of appellate counsel during his direct appeal. Two of the ten issues on which Franklin sought to file a "supplemental brief" included claims that the trial court failed to grant a mistrial based on the actions of juror Patricia Arthur, and that trial counsel was ineffective in failing to challenge Arthur for

cause. App. 104a-106a. The Supreme Court of Ohio denied the motion without opinion. App. 43a, 106a-107a.[1]

Shortly thereafter, Franklin filed a petition for post-conviction relief in the trial court, alleging sixty-three grounds for relief. App. 107a-119a. Among these was the claim that his convictions and sentence were "void or voidable because the service of a biased juror on the jury in Petitioner's case violated his right to trial by a fair and impartial jury and to due proc ss." App. 108a. The trial court denied Franklin's claim, because he failed to present it on direct appeal. The Ohio Court of Appeals affirmed that decision. App. 123a. The Ohio Supreme Court declined discretionary review, see *State v. Franklin*, 72 Ohio St. 3d 1538 (1995), as well as Franklin's later Motion for Reconsideration, see *State v. Franklin*, 73 Ohio St. 3d 1429, 652 N.E.2d 801 (1995). This Court then again denied certiorari. *Franklin v. Ohio*, 516 U.S. 950, 116 S. Ct. 394, 133 L. Ed. 2d 315 (1995). App. 126a.

While his post-conviction proceedings were pending, Franklin also filed a Motion for Delayed Reconsideration with the original appellate court, seeking to reopen his direct appeal. Franklin alleged that his appellate counsel had been constitutionally ineffective for failing to raise, or for ineffectively arguing, thirty-three other assignments of error, including the juror bias claim relied on by the court below. App. 126a-132a. The state appeals court denied Franklin's request for delayed reconsideration, stating that Franklin had failed to show good cause why he had not applied for reconsideration within ninety days of the court's judgment on direct appeal, as Ohio law requires. App. 132a. Franklin then

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[1] In Ohio, ordinarily a claim not presented to the Ohio Court of Appeals will not be considered upon later appeal to the Supreme Court of Ohio. See *State v. Williams*, 51 Ohio St. 3d 112 (1977), paragraph 2 of the syllabus.

appealed, but the Ohio Supreme Court summarily dismissed the case. App. 132a-133a.

C. The federal courts granted Franklin's habeas petition based on his juror bias claim, and required the state to give Franklin a new trial.

Franklin filed his habeas petition in the United States District Court for the Southern District of Ohio, alleging twenty-eight grounds in support of relief. App. 89a-95a, 128a. The juror bias claim was reflected in three of those grounds. Franklin's first claim was that he received constitutionally ineffective assistance of appellate counsel for a variety of reasons, including counsel's failure to raise the juror bias claim as well as counsel's failure to raise trial counsel's effectiveness. App. 89a, 314a-315a. As his second ground for relief, Franklin alleged that his trial counsel were constitutionally ineffective for failing to move for either cause-based or peremptory excusals of biased jurors. App. 89a. Finally, as his sixth ground for relief, Franklin asserted that including a biased juror on the panel violated his Sixth and Fourteenth Amendment rights to a fair and impartial jury and his right to due process. App. 90a.

In response, the Warden argued that the first, second and sixth grounds were procedurally defaulted. App. 174a. The magistrate judge rejected the Warden's procedural default defenses and recommended granting the writ on Franklin's sixth ground for relief (his juror bias claim), as well as on his first and second grounds for relief to the extent those ineffectiveness claims rested on the failure to press the juror bias claim. App. 206a. The magistrate judge recommended that the district court deny Franklin's other grounds for relief. 314a.

Both Franklin and the Warden filed objections to the magistrate judge's Report and Recommendations. App. 342a. The magistrate entered an Amended Supplemental Report and Recommendations, recommending the district court

overrule each party's objections. App. 354a. Franklin then filed additional objections to the Amended Supplemental Report and Recommendations. App. 45a. The district court overruled the parties' objections, and adopted the magistrate judge's Amended Supplemental Report and Recommendations, as supplemented by the district court's own decision. App. 86a. Specifically, the district court concluded that although Franklin had failed to raise his juror bias claim either at trial or on direct appeal, ineffective assistance of appellate counsel provided cause and prejudice to excuse the procedural default. App. 44a, 85a. In doing so, the court never discussed whether the standard for showing prejudice under *Strickland* was the same as, or different from, the standard for prejudice under *Sykes*.

The Warden appealed, and the Sixth Circuit affirmed in a 2-1 decision. As the lower court did, the Sixth Circuit concluded that Franklin had not defaulted his ineffective-assistance-of-appellate-counsel claim. App. 6a. The court also found that a non-defaulted ineffective assistance claim, if meritorious, could serve as "both cause and prejudice, excusing a procedural default in an underlying substantive claim" (i.e., the juror bias claim). App. 5a. In assessing whether Franklin had proven prejudice here, however, the court never differentiated between the concept of "prejudice" for purposes of showing ineffective assistance (i.e., what this petition refers to as *Strickland* prejudice), and the prejudice necessary to meet the "actual prejudice" standard from *Sykes* to excuse a procedural default. App. 13a-28a, 33a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition presents an important question about ineffective assistance claims in habeas, on which the circuits are cleanly divided. The question here arises largely because

such claims pull double duty in habeas. Ineffective assistance of counsel is, of course, an independent substantive basis for granting habeas relief under the Sixth Amendment. The Court held in *Strickland* that to obtain such relief, the petitioner must establish both "deficient performance" and "prejudice." Alternatively, ineffective assistance can also serve as a so-called gateway claim. That is, as a general rule, a petitioner's failure to raise a claim in state court bars the petitioner from relying on that claim in habeas; such claims are deemed procedurally defaulted. Where a petitioner can establish "cause and prejudice" under *Sykes*, however, that default is excused. The Court has expressly held that ineffective assistance can constitute "cause" for failure to raise a claim in state court. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). This petition, though, asks the Court to clarify the relationship between the "prejudice" that a petitioner must show to demonstrate ineffective assistance (and thereby establish *Sykes* "cause"), and the "prejudice" necessary to meet *Sykes*'s separate prejudice prong.

A. This case presents an important question on which the circuits are divided regarding the proper analysis of ineffective-assistance-of-counsel claims in habeas corpus.

The circuit split at issue here arises against the general backdrop of the procedural default doctrine. As a general matter, habeas petitioners must present their claims to state court, and their failure to do so results in "procedural default" precluding relief on those claims in habeas. Petitioners can escape this rule only where they can establish "'cause' and 'prejudice'" for their default. *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977). That is, they must show both a good "cause" for their failure to advance the claim in state court, and "prejudice" resulting from the failure to do so. *Id.* at 84. And in *Murray*, the Court emphasized that "cause" and "prejudice" are distinct requirements. Where the "cause" is

ineffectiveness, however, the circuits have split on how to treat *Sykes*'s separate prejudice prong.

No one disputes that constitutional ineffectiveness of counsel may constitute "cause" to excuse a procedural default. *Murray*, 477 U.S. at 488. But attorney error short of constitutional ineffectiveness will not do. In the Court's words, "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." *Id.* at 492. Thus, to establish *cause* under *Sykes* (*Murray* involved *Sykes*'s cause and prejudice standard), a petitioner must meet *Strickland*'s ineffectiveness standard. But *Strickland*'s standard for ineffectiveness requires its own showing of "prejudice." That is, to establish an ineffectiveness claim under *Strickland* (which is what *Sykes* "cause" requires), a petitioner must show not only deficient performance, but also that he was prejudiced by that deficiency, *Strickland*, 466 U.S. at 687, with the latter requiring a showing that there is at least a reasonable probability that, absent the attorney's faults, a different result would have occurred, *id.* at 694. In other words, when relying on ineffective assistance as the "cause," *Sykes*'s "cause" prong incorporates *Strickland*'s "prejudice" component.

The question then is whether, and to what extent, *Sykes*'s separate "prejudice" prong requires a greater showing of "prejudice" than the *Strickland* prejudice that the petitioner must have necessarily demonstrated in meeting the *Sykes* "cause" prong. Importantly, *Murray* itself strongly implies that some greater showing is necessary. The Court, after all, held *only* that ineffectiveness could constitute "cause," *not* that it could constitute "prejudice." Good reasons support the Court's reticence to go further. For example, where the alleged ineffectiveness is appellate counsel's failure to raise a particular claim, an evaluation of prejudice under *Strickland* would necessarily involve an assessment of the merits of the claim that counsel failed to

raise. See *Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of the effective assistance of counsel be overcome." (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Obviously, a petitioner who can demonstrate "prejudice" sufficient to excuse his default, by simply showing that his defaulted claim has merit, has made a complete "end run" of the exhaustion and procedural default rules, as he has succeeded in having a court review the merits of his defaulted claim. Thus, in limiting its holding to "cause," the Court strongly suggested that "prejudice" sufficient to excuse a default involves either a showing of a different *type* of prejudice, i.e, something apart from the merits of the overlooked claim, or, more likely, a showing of a higher *degree* of prejudice, e.g., something higher than the reasonable probability of a different result that *Strickland* prejudice encompasses.

But despite *Murray*'s straightforward implications, the circuits are split on the issue. The Sixth, Ninth, and Eleventh Circuits, and arguably the Fifth, have treated the "prejudice" standards of *Strickland* and *Sykes* as virtually identical. *Martin v. Mitchell*, 280 F.3d 594, 606 (6th Cir. 2002) (implying that "actual prejudice" under *United States v. Frady*, 456 U.S. 152, 167-69 (1982), which is the same as *Sykes* "prejudice," is interchangeable with *Strickland* "prejudice"); *Deutscher v. Whitley*, 884 F.2d 1152, 1156 (9th Cir. 1989) ("Because actual prejudice is an aspect of ineffective assistance of counsel, a defendant who proves ineffective assistance need not make any additional showing to overcome procedural default."), reversed on other grounds, 500 U.S. 901 (1991); *Hollis v. Davis*, 941 F.2d 1471, 1480 (11th Cir. 1991) (equating *Strickland* and *Sykes* standards of prejudice). See also *Cook v. Lynaugh*, 821 F.2d 1072, 1079 (5th Cir. 1987) (petitioner's showing of prejudice under *Strickland* also constituted requisite showing under *Sykes*). But see also *Johnson v. Blackburn*, 778 F.2d 1044, 1048 n.3

(5th Cir. 1985) (addressing whether counsel's failure to object to instruction gave rise to prejudice under *Strickland*, but declining to address definition of "prejudice" under *Sykes*).

However, the Fourth, Eighth, and D.C. Circuits have recognized, consistent with *Murray*, that demonstrating "prejudice" for the purposes of excusing a procedural default necessarily requires the petitioner to shoulder a heavier burden than showing "prejudice" under *Strickland*. In *Waye v. Townley*, 871 F.2d 18, 21 (4th Cir. 1989), the Fourth Circuit held, in direct conflict with the Ninth Circuit's decision in *Deutscher*, that "[e]ven assuming that Waye could show prejudice under *Strickland*, he could not demonstrate prejudice pursuant to *Wainwright v. Sykes* in order to lift the procedural bar," because "in order to overcome a waiver a petitioner must show actual prejudice in addition to showing cause." In *Zinzer v. Iowa*, 60 F.3d 1296, 1299 n.7 (8th Cir. 1995), the Eighth Circuit observed that "the 'prejudice' component of 'cause and prejudice' is analytically distinct" from "*Strickland* prejudice," and that "the 'actual prejudice' required to overcome the procedural bar must be a higher standard than the *Strickland* prejudice required to establish the underlying claim for ineffective assistance of counsel." The D.C. Circuit similarly has held that to excuse a procedural default, the petitioner must at *least* establish prejudice under *Strickland*, and observed that "circuit precedent suggests that habeas prejudice may require a greater showing." See *United States v. Pettigrew*, 346 F.3d 1139, 1144 & n.12 (D.C. Cir. 2003), and the cases cited therein.

Finally, the Seventh Circuit has expressly noted that the question is unsettled, but has declined so far to resolve it. So, for example, in *Freeman v. Lane*, 962 F.2d 1252, 1259 & n.5 (7th Cir. 1992), the court noted that "it is an open question" whether a finding of prejudice under *Strickland* would also establish prejudice under *Sykes*, but, without

articulating a difference in the two standards, held that the petitioner satisfied both. In reaching this conclusion, the Seventh Circuit reasoned that appellate counsel's ineffectiveness *and* the trial error that appellate counsel neglected to raise "satisfied independently either standard." *Id.* at n.5. Thus, the Seventh Circuit apparently found prejudice sufficient to overcome the petitioner's default based largely on the merits of the defaulted claim. *Id.* And in another case, the Seventh Circuit again observed that the question is open, noting "there may be room for argument that *Strickland* prejudice and *Sykes* prejudice should not be equated and that the *Sykes* version is more stringent." *Rodriguez v. Young*, 906 F.2d 1153, 1159 n.2 (7th Cir. 1990).

In short, the circuits are cleanly divided and the issue is ripe for review. At least six circuits have already weighed in, and a seventh has noted the problem. Further percolation would serve little purpose, and, as described below, this split has important ramifications for habeas review.

B. Resolution of the question presented is necessary to ensure that an appropriate remedy is afforded in this case.

The circuits' disagreement on this question results in important differences in the relief available to habeas petitioners depending on the circuit in which they advance their claims. For example, the relief ordered in Franklin's case—a new trial versus a second state appeal—is dictated by whether the ineffectiveness of appellate counsel is also sufficient to excuse the default of the biased juror claim. But that inquiry, of course, may turn on whether the prejudice shown to demonstrate ineffectiveness automatically shows *Sykes* prejudice. The circuits' disagreement on that issue thus means that a defendant's remedy on habeas may turn merely on the happenstance of the circuit in which he is located.

Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct

wrongs of constitutional dimension. *Smith v. Phillips*, 455 U.S. 209, 221 (1982). "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Where a habeas corpus petitioner establishes a violation of the right to the effective assistance of counsel on direct appeal, by virtue of counsel's failure to raise a particular claim, the uniform view among the circuits is that the appropriate relief is to afford the petitioner a belated appeal on the issue that counsel ineffectively failed to raise. See *Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004); *Roe v. Delo*, 160 F.3d 416, 420 (8th Cir. 1998); *Mason v. Hanks*, 97 F.3d 887, 902 (7th Cir. 1996); *Bell v. Lockhart*, 795 F.2d 655, 658 (8th Cir. 1986).

But if the *Sykes* prejudice prong collapses into *Strickland* prejudice, as some circuits allow, then an ineffective-assistance-of-appellate-counsel claim serves not only as *Sykes* cause, but also as *Sykes* prejudice, thus excusing the default of an underlying claim. The appropriate remedy then (assuming the federal court determines the underlying claim to be meritorious) should be a new trial. Here, for example, the courts below determined that the alleged ineffectiveness of Franklin's appellate counsel established both cause and prejudice to excuse the default of his juror bias claim. Accordingly, without even any separate discussion of *Sykes*'s prejudice prong, the courts relied on the prejudice used to show ineffective assistance of *appellate* counsel as a basis for granting a new *trial*.

That is not to say that a case involving an ineffective-assistance-of-appellate-counsel claim, when used as a gateway to some underlying substantive claim, should never result in a new trial rather than a new appeal. Rather, the point is that in some circuits (those that do not require a separate showing of prejudice), such claims, if successful, will *always* result in a new trial, while in other circuits (those that recognize that *Sykes*'s prejudice standard requires more

than the *Strickland* prejudice used to establish cause), a petitioner may be entitled to a new appeal, without automatically becoming entitled to a new trial. Thus, the differing treatment of this issue among the circuits results in similarly-situated habeas petitioners receiving substantially different relief, based solely on the circuit in which they file.

C. The States have a vital interest in clarifying the threshold for ineffective-assistance-of-appellate-counsel claims to act as a "gateway" to the merits of otherwise defaulted claims.

Resolution of this issue is a matter of substantial importance to the States. Ineffective assistance of counsel is alleged in virtually every capital case, and it is the usual gateway through which claims never presented to the state courts are raised for the first time in federal habeas corpus. Against this backdrop, the approach adopted by the court here—treating *Strickland* and *Sykes* prejudice as the same, so that a showing of ineffectiveness actually satisfies both *Sykes*'s cause *and* prejudice prongs—works significant hardships on the States. In particular, it encourages defendants to game the system, and has the incongruous result of actually providing habeas petitioners greater relief on errors they do *not* raise during their direct appeal than on those errors that they actually do raise.

1. This case provides a textbook example of the way in which defendants can game the system if every showing of ineffective assistance of appellate counsel is sufficient, in and of itself, to establish *Sykes* cause and prejudice. Ohio law provides that prisoners may present claims of ineffective assistance of appellate counsel by requesting reconsideration or reopening of their direct appeals. The court below held that, by availing himself of that avenue, Franklin had fairly presented to the state courts his claim of ineffective assistance of appellate counsel. See *Edwards v. Carpenter*, 529 U.S. 446, 452 n.3 (2000) (claim of ineffective assistance

of appellate counsel that is procedurally defaulted cannot serve as "cause" to excuse the default of another claim). In his application for delayed reconsideration of his direct appeal, however, Franklin alleged that appellate counsel were ineffective in failing to raise *thirty-three* claims of error, one of which was the failure to raise the "biased juror" claim.

The strategy Franklin employed is readily apparent. It is untenable to argue that *all* of the purported errors listed in the application presented "clearly stronger" issues than the claims actually presented by appellate counsel, yet that is the standard he must meet to establish ineffective assistance of appellate counsel. See *Smith v. Robbins*, 528 U.S. at 288. Rather, Franklin simply sought a renewed appeal to present additional claims of error, with a view to later presenting those same errors in federal habeas corpus. By presenting his additional claims in an application to reopen his appeal based on ineffectiveness of appellate counsel, Franklin essentially preserved the option to later assert the alleged ineffectiveness of his appellate counsel as "cause" for his failure to present the claims on direct appeal in the first instance, basically allowing him to unilaterally overcome his procedural default merely though the artifice of filing the application. The possibility of such deliberate gaming is very real, and indeed, the Court recognized in *Murray* that relaxing procedural-default rules encourages such behavior, as then appellate counsel "might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for habeas corpus review should the appeal be unsuccessful." 477 U.S. at 492.

2. Indeed, the approach below not only allows habeas petitioners to circumvent state procedural rules, but also to receive better treatment in habeas of "defaulted" claims than of non-defaulted claims. As this Court has recognized, "[e]ach State's complement of procedural rules ... channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at

which they can be resolved most fairly and efficiently." *Reed v. Ross*, 468 U.S. 1, 10 (1984). Ohio's contemporaneous objection rule provides generally that claims of error not objected to at trial may not be a basis for relief on appeal, absent plain error. The rule serves the state's interest in providing the trial court with the opportunity to correct error without the necessity for a re-trial, and, discourages "sandbagging," e.g., the deliberate withholding of a dispositive claim as insurance in the event of a conviction. See *Engle v. Isaac*, 456 U.S. 107, 128-130 & n.34 (1982). The Court has held that Ohio's invocation of its contemporaneous objection rule to preclude review on appeal is an adequate and independent state ground of decision that precludes relief in federal habeas corpus. *Id.* What that means, of course, is that for those trial errors raised for the first time during direct appeal (rather than at trial), an Ohio appellate court may dispose of them without considering their merits, and that holding in turn also precludes habeas review.

Against this backdrop, however, the availability of ineffective assistance of appellate counsel as "cause," where the prisoner has failed to lodge an objection at trial, actually rewards the prisoner who bypasses the normal appellate process. By raising the claim later as a basis for a collateral attack on appellate counsel's performance, rather than during direct appeal, the prisoner successfully bypasses Ohio's normal appellate process, and avoids the "plain error" standard that would otherwise apply to his defaulted claim. With this strategy, the prisoner actually obtains a "merits" review, as the court in the collateral action must address the relative merit of the defaulted claim as part of its ineffectiveness calculus. And, rather than having a "higher hurdle" to obtaining relief on collateral review, the prisoner has lowered the hurdle by successfully "end-running" the state's contemporaneous objection rule.

It matters little to the prisoner, and certainly is of no help to the State, that the claim is asserted in the guise of ineffective assistance of appellate counsel. Ostensibly, the prisoner must satisfy the two-pronged *Strickland* test, which applies both on direct appeal and collateral review. See *Strickland*, 466 U.S. at 697. As a practical matter, then, relief will ultimately depend on a showing of the merits of the previously unasserted claim. In other words, if the court upon collateral review (whether in state court or in federal habeas corpus) can be convinced that the previously unasserted claim is meritorious, then the court is apt to conclude, as the Sixth Circuit did here, that the error was so manifest that "no claims of strategy" can excuse the failure of trial counsel to object or the failure of appellate counsel to raise the claim on appeal. App. 33a.

The damage this result imposes on the finality of the State's criminal judgments is self-evident. As the Court noted in *Murray*, requiring a prisoner to raise claims initially on appeal rather than post-conviction "affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal," and "promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." 477 U.S. at 490-491, quoting *Reed v. Ross*, 468 U.S. at 10-11. But allowing the use of ineffective assistance of appellate counsel, without more, to satisfy both *Sykes*'s "cause" and "prejudice" prongs undercuts our efforts to resolve claims in state courts. To the contrary, the Sixth Circuit's approach actually encourages prisoners to *withhold* on direct appeal any claims that the state appeals court would likely classify as waived, thereby virtually guaranteeing that the claims will not be reviewed at the stage of the judicial process at which

they can be resolved most fairly and efficiently. By accepting this case for review and reversing the decision below, the Court can clarify the relationship between *Strickland* prejudice and *Sykes* prejudice, and put an end to such manipulation.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

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No. 06-513

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

GEORGE T. FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

GEORGE T. FRANKLIN,

Petitioner-Appellee/Cross-Appellant,

v.

CARL S. ANDERSON, Warden, Respondent-Appellant/Cross-Appellee.

Nos. 03-3636/03-3697
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
434 F.3d 412
January 9, 2006, Decided

BEFORE: BOGGS, Chief Judge; and BATCHELDER and CLAY, Circuit Judges.

BOGGS, Chief Judge. In December 1988, George Franklin was found guilty of two counts of aggravated burglary and one count of aggravated murder and was sentenced to death. He began a long process of appeals, with each state court affirming his convictions or dismissing his claims as res judicata. On petition for habeas corpus to the Southern District of Ohio, however, [**2] Franklin was found to have two viable claims: service of a biased juror and ineffective assistance of appellate counsel, neither of which the court found to be procedurally defaulted. The court granted a [***2] conditional writ of habeas corpus on these two issues. In addition, although denying Franklin's petition on the remaining 26 claims, the district court granted a certificate of appealability (COA) on three issues: ineffective assistance of trial counsel, discriminatory use of peremptory challenges by the prosecutor, and the prosecutor's failure to

provide the defense with material exculpatory and impeachment evidence at trial. Because Franklin did not object to the district judge's denial of habeas on any other issues, all other claims are forfeited on appeal and are not before this court. *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The State appeals the conditional grant of habeas, and Franklin cross-appeals the denial of habeas on the three issues certified for appeal.

I

Franklin was convicted of the brutal murder of Gerald Strauss in his Cincinnati home on the evening of July 23, 1988 and of the theft of a television from the [**3] nearby apartment of Rosha Winston seventeen days earlier. The jury recommended the death penalty, and the judge sentenced Franklin to death in addition to two consecutive ten- to twenty-five-year terms of imprisonment for the aggravated burglaries at Strauss's and Winston's homes. *State v. Franklin*, 62 Ohio St. 3d 118, 580 N.E.2d 1, 3-5 (Ohio 1991).

Represented by new counsel, Franklin appealed his conviction through the Ohio courts. After the Ohio Supreme Court affirmed his conviction and sentence on direct appeal, a third set of attorneys took up his case and further attempted to secure relief in the Ohio courts, first by requesting that the Ohio Supreme Court recall its mandate and permit supplemental briefing on direct appeal and, when that request was denied without an opinion, *State v. Franklin*, 63 Ohio St. 3d 1402, 585 N.E.2d 424 (1992), by seeking post-conviction relief. The Hamilton County Common Pleas Court denied the petition for post-conviction relief without an evidentiary hearing, a decision that was affirmed by the Hamilton County Court of Appeals. *See State v. Franklin*, 1995 Ohio App. LEXIS 183, 1995 WL 26281 (Ohio App. [**4]), appeal not allowed, 72 Ohio St. 3d 1538, 650 N.E.2d 479, *cert. denied*, 516 U.S. 950, 116 S. Ct. 394, 133 L. Ed. 2d 315 (1995).

Franklin also sought delayed reconsideration in the Ohio Court of Appeals, and his motion was denied for failure to file within the ninety-day time limit. *State v. Franklin*, No. C-890028 (Ohio App. Mar. 3, 1994).

Franklin then sought a writ of habeas corpus in federal district court. The district court referred the matter to a magistrate judge for a report and recommendations. The magistrate judge held an evidentiary hearing and issued a comprehensive report. After amending the report slightly in response to objections filed by the parties, the magistrate judge recommended that the court grant the requested writ of habeas corpus with respect [*417] to Franklin's claim that his convictions and sentences were unconstitutional because one of the jurors could not impartially apply the law, a claim the magistrate found was not procedurally barred because Franklin had received ineffective assistance of appellate counsel on direct appeal. The district court adopted the report and recommendation, granting a conditional writ of habeas corpus on the biased juror and ineffective assistance [**5] of appellate counsel claims and dismissing all other claims as meritless. In this appeal, we are asked to consider five issues: (1) whether a juror, who was unable to follow the law, sat on Franklin's jury; (2) whether the prosecution dismissed prospective jurors for reasons of race; (3) whether the prosecution failed to provide Franklin with exculpatory material and impeachment evidence; (4) whether Franklin's trial counsel was ineffective for failing to conduct adequate investigations during the trial and the mitigation phases; and (5) whether his appellate counsel was ineffective.

As Franklin filed his Petition for Writ of Habeas Corpus on November 14, 1995, prior to the April 24, 1996 effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA), we apply a pre-AEDPA standard of review. *Sowell v. Bradshaw*, 372 F.3d 821, 828 (6th Cir.

2004). We review the district court's judgment de novo [***3] and its findings of fact for clear error. *Carter v. Bell*, 218 F.3d 581, 590 (6th Cir. 2000). In addition, absent clear and convincing evidence, we presume the state court's findings [**6] of fact to be correct. *See Wainwright v. Goode*, 464 U.S. 78, 85, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983). We may issue a writ of habeas corpus only if we find that the state court proceedings were fundamentally unfair due to a violation of the Constitution or other federal law. *Sowell*, 372 F.3d at 828.

II

Franklin did not raise the issues under consideration in this appeal on his direct appeal in the state courts, but rather raised them for the first time in his Motion to Recall the Mandate before the Ohio Supreme Court and then later in his post-conviction proceedings. Therefore, the post-conviction courts refused to consider the merits of all of the claims, other than several of the ineffective assistance of counsel claims, on the ground that they were barred by res judicata . In Ohio, res judicata bars state courts from considering constitutional claims in post-conviction collateral attacks when those claims have already or could have been fully litigated on direct appeal. *Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002). Absent cause or prejudice, when a habeas petitioner fails to obtain consideration of a claim by the state [**7] courts due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, the claim is procedurally defaulted and may not be considered by the federal court on habeas review. *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Lancaster v. Adams*, 324 F.3d 423, 436 (6th Cir.), *cert. denied*, 540 U.S. 1004, 124 S. Ct. 535, 157 L. Ed. 2d 409 (2003); *Seymour v. Walker*, 224 F.3d 542, 549-50 (6th Cir. 2000). Demonstrating cause requires showing that an "objective factor external to the defense impeded

counsel's efforts to comply" with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Demonstrating prejudice requires showing that the trial was infected with constitutional error. *See United States v. Frady*, 456 U.S. 152, 169, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

[*418] Consequently, we must first decide whether Franklin can show cause and prejudice to excuse his procedural default. We focus on Franklin's claim of ineffective assistance of counsel, because such a claim can serve as both cause and prejudice, excusing a procedural [**8] default in an underlying substantive claim, as long as the petitioner can also show cause and prejudice to excuse the procedural default of the ineffective assistance claim itself. *Edwards v. Carpenter*, 529 U.S. 446, 450-52, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

To determine whether Franklin had cause for his procedural default, we apply the four-part test set forth in *Maupin v. Smith*.

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
>
> . . . .
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.

. . . .

> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by [**9] the alleged constitutional error.

785 F.2d 135, 138 (6th Cir. 1986) (citations and footnote omitted). We agree with the district court that Franklin's ineffective assistance of appellate counsel claim is not barred from review under the [***4] *Maupin* test because at the time he filed his Motion for Delayed Reconsideration, in which he raised the claims he makes on appeal in the instant case, the Ohio courts did not have a "firmly established and regularly followed" procedural rule governing the timeliness of such motions. *James v. Kentucky*, 466 U.S. 341, 348, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984).

Franklin filed a Motion for Delayed Reconsideration with the Ohio Court of Appeals on June 30, 1993, advancing thirty-four assignments of error, including the claim of ineffective assistance of appellate counsel. On that date, the Ohio rules controlling the filing of claims of ineffective assistance of appellate counsel through Motions for Delayed Reconsideration were somewhat unclear. One year earlier, the Ohio Supreme Court had decided *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), holding that ineffective assistance of appellate [**10] counsel claims had to be brought under Ohio R. App. P. 26 (later to become Rule 26(A)), through an application for delayed reconsideration in the court of appeals in which the alleged error took place, *id.* at 1208-09. Prior to *Murnahan*, such claims had been brought in the regular post-conviction hearings before the trial court.

Ibid. However, *Murnahan* did not establish a time period for filing Rule 26 motions.

Under Rule 26, as it existed at the time *Murnahan* was filed, a petitioner had ten days from the date the previous opinion was filed to file an application for reconsideration of any cause or motion submitted on appeal. Ohio R. App. P. 26(A). However, in deciding *Murnahan*, the Ohio Supreme Court had opined that the courts should take a more lenient attitude toward timeliness in ineffective assistance of counsel claims:

> [*419] Since claims of ineffective assistance of appellate counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted for reconsideration in the court of appeals or appeal to this court, it may be necessary for defendants to request delayed [**11] consideration. Therefore, in an individual case where a defendant has put forth a colorable claim of ineffective assistance of appellate counsel, where the circumstances render the application of res judicata unjust, and the time periods for reconsideration in courts of appeals and direct appeal to this court have expired, he or she must: (1) apply for delayed reconsideration in the court of appeals where the alleged error took place pursuant to App. R. 26 and 14(B), and if delayed reconsideration is denied, then (2) file for delayed appeal in this court pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court. Before granting reconsideration, the court of appeals should determine whether there are substantive grounds for relief.

Murnahan, 584 N.E.2d at 1209 (footnotes omitted); *see also Henderson v. Collins*, 101 F. Supp. 2d 866, 887 (S.D. Ohio 1999) (concluding that "neither the *Murnahan* decision nor Ohio App. R. 14(B) set an outer limit or absolute deadline that would have alerted Petitioner to a certain deadline for filing a *Murnahan* Application pursuant to the rule [announced in *Murnahan*]."), vacated [**12] in part on other grounds, 262 F.3d 615 (6th Cir. 2001). Furthermore, the *Murnahan* court specifically noted that the state appellate rules as then written may have been insufficient to provide the remedy set forth in its opinion. The opinion stated:

> In light of the fact that Ohio has no statutory authority or court rules dedicated to the procedure to be followed by defendants who allege ineffective assistance of appellate counsel, we recommend that the Rules Advisory Committee appointed by this court review whether an amendment to App. R. 14(B) or a new rule should be adopted to better serve claimants in this position.

584 N.E.2d at 1209 n.6. [***5]

Murnahan led to the creation of a special Application to Reopen procedure, codified at Ohio R. App. P. 26(B). This rule includes a timeliness provision that requires the application to reopen to be filed within ninety days of the journalization of the appellate judgment unless the applicant shows good cause for filing at a later time. R. 26(B)(1). Rule 26(B) went into effect on July 1, 1993-the day after Franklin filed his Motion for Reconsideration under R. 26. Nonetheless, the [**13] Ohio Court of Appeals applied the 26(B) standard to Franklin's motion, dismissing it because he had not filed within 90 days of the journalization of his initial appellate judgment, and notwithstanding the fact that he was represented by the same counsel at his appeals before the

Ohio Court of Appeals and the Ohio Supreme Court. In a footnote to the decision, the court noted that applying App. R. 26(B) was not unreasonable, even though it had not been in force on the day Franklin filed his motion, because under the previous rule, he would only have had 10 days to file, whereas under the new rule he had 90 days.

If we follow the reasoning of this footnote, and take as our procedural starting point the rules that were actually in place on the day that Franklin filed his Motion for Reconsideration, there would be no procedural default. As discussed above, *Murnahan* placed no time limit on applications and specifically noted that the 10-day limit in the then-current Rule 26 was too short. The State points to *Hicks v. Collins*, [*420] 384 F.3d 204 (6th Cir. 2004), as holding that in the area of the Ohio First District Court of Appeals, in which Franklin filed his Motion for [**14] Reconsideration, the rule was established that (1) ineffective assistance of appellate counsel claims had to be brought according to the then-current Rule 26 (later 26(A)), and (2) Rule 26 had an enforced 10-day limit on filing. However, Hicks is inapposite here because it applies to a time before *Murnahan*. In *Hicks*, the defendant brought his ineffective assistance of counsel claim in a post-conviction proceeding, even though it was established in that District that the claim should have been brought in a Motion for Reconsideration. His claim was dismissed, and he waited approximately 18 months to file the Motion correctly. In the interim, the Ohio Supreme Court ruled on *Murnahan*, and the Appeals Court dismissed Hicks's motion as untimely. We, in upholding the procedural default, relied on the fact that pre-*Murnahan* there was a procedure that Hicks could have followed in a timely fashion, so his failure to do so could not constitute cause for his later procedural default. 384 F.3d at 212.

If, on the other hand, we consider the Ohio Court of Appeal's application of the new Rule 26(B) to Franklin's

motion, we must also find that the State does not fulfill [**15] the elements of *Maupin* test necessary to bar review. The first *Maupin* factor requires that there was a "state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." 785 F.2d at 138. For the Rule 26(B) requirement to be applicable to Franklin, it would have to have been applied retroactively. However, the United States Supreme Court has held that a petitioner relying on prior rulings cannot be held to new procedural requirements that go into effect after petitioner raised his claim. *Ford v. Georgia*, 498 U.S. 411, 424, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991). Furthermore, even if we were to find that the new Rule 26(B) procedures were applicable to Franklin, the Supreme Court in Ford concluded that because the new rule had not been announced by the time Ford could have raised his claim in a timely manner, it was inadequate to serve as an independent state ground for procedural default purposes because it was not "'firmly established and regularly followed' by the time as of which it [was] to be applied." *Ibid.* (quoting *James v. Kentucky*, 466 U.S. 341, 348, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984)). [**16] Therefore, the application of Rule 26(B) would not meet the third prong of the *Maupin* test that the rule be an "adequate and independent" state ground for foreclosing review.

Rule 26(B) also fails to meet the second part of the *Maupin* test, that courts "actually enforced the state procedural sanction." 785 F.2d at 138. A review of the relevant case law reveals that the Ohio Supreme Court has been erratic in its handling of untimely Rule 26(B) applications in capital cases. For several years following the enactment of amended Rule 26(B), the Ohio Supreme Court regularly enforced the rule's timeliness requirements. *See, e.g., State v. Mason*, 90 Ohio St. 3d 66, 2000 Ohio 14, 734 N.E.2d 822, 822-23 (Ohio 2000); *State v. Dunlap*, 89 Ohio

St. 3d 277, 2000 Ohio 159, 730 N.E.2d 985, 986 (Ohio 2000); *State v. Ballew*, 89 Ohio St. 3d 204, 2000 Ohio 134, 729 N.E.2d 753, 754-55 (Ohio 2000); *State v. Davis*, 86 Ohio St. 3d 212, 1999 Ohio 160, 714 N.E.2d 384, 385-86 (Ohio 1999); [***6] *State v. Dennis*, 86 Ohio St. 3d 201, 1999 Ohio 94, 713 N.E.2d 426, 427 (Ohio 1999); *State v. Fox*, 83 Ohio St. 3d 514, 1998 Ohio 517, 700 N.E.2d 1253, 1254 (Ohio 1998); *State v. Hill*, 78 Ohio St. 3d 174, 1997 Ohio 293, 677 N.E.2d 337, 338 (Ohio 1997); [**17] *State v. Whalen*, 74 Ohio St. 3d 633, 1996 Ohio 6, 660 N.E.2d 1174, 1175 (Ohio 1996); *State v. Reddick*, 72 Ohio St. 3d 88, 1995 Ohio 249, 647 N.E.2d 784, 786 (Ohio 1995). However, in 2000 it began ignoring the lower courts' dismissals of Rule 26(B) applications as untimely and [*421] affirming the dismissal of the applications on the merits. *See State v. Mack*, 101 Ohio St. 3d 397, 2004 Ohio 1526, 805 N.E.2d 1108, 1109 (Ohio 2004); *State v. Goff*, 98 Ohio St. 3d 327, 2003 Ohio 1017, 784 N.E.2d 700, 701 (Ohio 2003); *State v. Mitts*, 98 Ohio St. 3d 325, 2003 Ohio 1007, 784 N.E.2d 698, 699-700 (Ohio 2003); *State v. Bryant-Bey*, 97 Ohio St. 3d 87, 2002 Ohio 5450, 776 N.E.2d 480, 481-82 (Ohio 2002); *State v. Sneed*, 96 Ohio St. 3d 348, 2002 Ohio 4768, 774 N.E.2d 1216, 1217-18 (Ohio 2002); *State v. Davie*, 96 Ohio St. 3d 133, 2002 Ohio 3753, 772 N.E.2d 119, 120-21 (Ohio 2002); *State v. Smith*, 95 Ohio St. 3d 127, 2002 Ohio 1753, 766 N.E.2d 588, 589-90 (Ohio 2002); *State v. Sanders*, 94 Ohio St. 3d 150, 2002 Ohio 350, 761 N.E.2d 18, 19-20 (Ohio 2002). *See State v. Moore*, 93 Ohio St. 3d 649, 2001 Ohio 1892, 758 N.E.2d 1130, 1132-33 (Ohio 2001); *State v. Carter*, 93 Ohio St. 3d 581, 2001 Ohio 1614, 757 N.E.2d 362, 363-64 (Ohio 2001); [**18] *State v. Biros*, 93 Ohio St. 3d 250, 2001 Ohio 1339, 754 N.E.2d 805, 806-07 (Ohio 2001); *State v. Brooks*, 92 Ohio St. 3d 537, 2001 Ohio 1278, 2001 Ohio 1323, 751 N.E.2d 1040, 1042-43 (Ohio 2001); *State v. Jalowiec*, 92 Ohio St. 3d 421, 2001 Ohio 164, 751 N.E.2d 467, 467-68 (2001); *State v. Palmer*, 92 Ohio St. 3d

241, 2001 Ohio 188, 749 N.E.2d 749, 751-52 (Ohio 2001); *State v. Hooks*, 92 Ohio St. 3d 83, 2001 Ohio 150, 748 N.E.2d 528, 530-31 (Ohio 2001); *State v. Bradley*, 91 Ohio St. 3d 570, 2001 Ohio 116, 747 N.E.2d 819, 820 (Ohio 2001); *State v. Sheppard*, 91 Ohio St. 3d 329, 2001 Ohio 52, 744 N.E.2d 770, 771 (Ohio 2001); *State v. Hill*, 90 Ohio St. 3d 571, 2001 Ohio 20, 740 N.E.2d 282, 283-84 (Ohio 2001); *State v. Jells*, 90 Ohio St. 3d 454, 2000 Ohio 93, 739 N.E.2d 345, 346 (Ohio 2000). Recently, in yet another reversal of practice, the Ohio Supreme Court has renewed affirming the dismissal of Rule 26(B) applications in capital cases as untimely. *See State v. Gumm*, 103 Ohio St. 3d 162, 2004 Ohio 4755, 814 N.E.2d 861, 862-63 (Ohio 2004); *State v. LaMar*, 102 Ohio St. 3d 467, 2004 Ohio 3976, 812 N.E.2d 970, 971-72 (Ohio 2004); *see also State v. Myers*, 102 Ohio St. 3d 318, 2004 Ohio 3075, 810 N.E.2d 436, 437-38 (Ohio 2004) [**19] (court affirms dismissal as the application was both untimely and meritless).

In light of the fluctuating treatment of Rule 26(B) applications by the Ohio Supreme Court, we cannot hold that the state courts have regularly followed and enforced the Rule's timeliness requirement. The Ohio Supreme Court's treatment of Rule 26(B) applications does not constitute on "occasional act of grace" in excusing the Rule's requirements, *Hutchison v. Bell*, 303 F.3d 720, 737 (6th Cir. 2002) (quoting *Coleman v. Mitchell*, 268 F.3d 417, 429 (6th Cir. 2001)), nor is the Supreme Court applying a clearly delineated exception to the timeliness requirement in these capital cases. *See Hutchison*, 303 F.3d at 738-39. While it could be argued that the rule was regularly established and followed at the time that the Ohio Supreme Court ruled on Franklin's Rule 26(B) application, such an interpretation would render an injustice as the Ohio Supreme Court apparently would not have applied the timeliness bar if Franklin had delayed even further in filing his Rule 26(B)

application and submitted it for review to the Ohio Supreme Court after 2000. Therefore, Rule 26(B) [**20] is not an adequate and independent state rule that can preclude consideration of Franklin's ineffective assistance of appellate counsel claim.

III

As Franklin has shown cause for procedurally defaulting his ineffective assistance of counsel claim, we turn now to the question of whether any of his claims rise to the level of constitutional defects such that appellate counsel's failure to raise them amounted to ineffective assistance of counsel. We first consider the claim that a juror who was biased because she could not follow the law sat on Franklin's jury. As explained below, we affirm the district court's judgment that this case warrants a grant of a conditional writ of habeas corpus. Since all of the claims on petitioner's cross-appeal relate to claims of trial-type error, those claims are rendered [*422] moot by a grant of habeas corpus, and we will not consider them further.

Franklin contends that one juror, Patricia Arthur, was biased because she misunderstood the presumption of innocence, Franklin's right not to testify, and the burden of proof in the case. Franklin also asserts that Arthur was predisposed to find that he had committed the crime just because he was the defendant [**21] in the case. The label "biased" is applied to two sorts of jurors. In the usual sense, a biased juror is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot "conscientiously apply the law and find the facts." *Wainwright v. Witt*, 469 U.S. 412, 423, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). While we do not agree with Franklin that [***7] Juror Arnold was "biased," in the sense of having a predisposition or prejudice against him, we, nonetheless, do find that she was not an impartial juror

because she demonstrated that she could not comprehend the legal standard she was supposed to apply.

To understand Franklin's claim, it is necessary to quote at length the voir dire and later questioning of Juror Arthur:

> Defense: Most people have a feeling somebody's charged with a crime-you all watch television and you've seen L.A. Law. Some of you put it down as your favorite program, so to speak. Pretty good show. You see somebody charged get up there and say I didn't do it and here's my side of the story. Fairly common reaction for everybody. In this case is there anybody here that feels George [Franklin] [**22] should get on that stand, testify and tell you his side of the story or whatever he may feel to be appropriate? Anybody feel that way? Nobody wants to hear George say anything?
>
> Arthur: To prove he's innocent.
>
> Defense: Do you feel he should get on the stand to prove he's innocent?
>
> Arthur: To me, I do, you know. I do.
>
> . . . .
>
> Court: Let me interject. Three of the jurors have said what you have said and what you think. The law is that Mr. Franklin doesn't have to do anything at a trial, except be here. He's not required to prove that he's innocent. He's not required to put on any evidence and if he chooses to follow that route, you're not allowed, under the law, to consider that against him because the burden of proof is upon the prosecution. The three of you that answered the way you did, could you accept my explanation of that?

JA 1021-23. The record does not reflect that any of the prospective jurors responded to the court's question. During the subsequent individual questioning of Arthur by the prosecutor, the following exchange occurred:

> Prosecutor: Considering all the questions that were briefly asked by counsel [**23] and the judge, do you have any answers at this point in time that would cause you to hold up your hand, anything different than before?
>
> Arthur: No, I don't.
>
> . . . .
>
> Prosecutor: You understand it's our burden of proof and we must prove each and every element of the crimes and specification charged beyond a reasonable doubt, do you understand that?
>
> Arthur: Yes, I do.
>
> Prosecutor: Do you have any problem with that?
>
> Arthur: No, I don't have any problem with it. [***8]
>
> . . . .
>
> [*423] Prosecutor: If we fail to prove one or more of the elements of the offense, you would acquit the defendant or find him not guilty, is that correct?
>
> Arthur: Yes, that's right, if it's proven, yes.
>
> Prosecutor: If we prove each and every one of those elements beyond a reasonable doubt, can you join with the rest of the panel and sign a verdict of guilty?
>
> Arthur: Yes, if it's proven, if it's proven guilty.

. . . .

Prosecutor: So, if the facts warrant and the law allows it, can you join with eleven other jurors in a verdict of guilty, knowing that the verdict would lead to this man's death?

[**24] Arthur: Yeah, if he's proven it's the right thing, I can.

. . . .

Prosecutor: Do you know of any reason, searching your mind at this point, why you could not be a fair and impartial juror in this case?

Arthur: No, I don't.

Prosecutor: You can be just as fair to the State of Ohio as you can to the defendant?

Arthur: Yes, I can.

Prosecutor: And you'll listen to all the evidence?

Arthur: Yes, I will, closely to them.

JA 1085-91. The State then passed Arthur for cause. The following dialog took place between Juror Arthur and defense counsel:

Defense: As you sit there now, you consider George, well, he's just George. He's sitting there, he's on trial. We're officers of the court. He's sitting there he's the defendant, but as to being guilty, you have no idea whether he's guilty of this crime? Arthur: No, I don't have no idea. But, just like the counselor said before, I would have to listen closely to why it happened.

Defense: Or how it happened?

Arthur: Yes, that's right.

Defense: Or whether George had anything to do with it?

Arthur: Yes, that's [**25] right.

Defense: In other words, one of the elements is to prove George has something to do with this crime; do you understand that? [***9]

Arthur: Uh huh.

Defense: And, although, if the prosecution was just to put on those pictures [of the victim] and say he's dead, I mean George was sitting here, that, alone, would not bring you to an opinion of his guilt or innocence?

Arthur: No, because like I said, I mean like he says, testimony, but I would just wonder why would he do it, you know?

Defense: Well, you say why would he do it, or if he did it, would you like to know that, too?

Arthur: If he did it or why did he do it.

Defense: First of all, you'd like to know if he did it?

Arthur: Yes, if he did it.

Defense: If you saw those pictures and the prosecutor pointed and said he did it, would that be enough to convince you?

Arthur: No.

Defense: In other words, you want to know more, some evidence?

Arthur: That's why I said what I did.

. . . .

Defense: I guess what we're asking for is just a fair trial.

Arthur: That's right. [**26]

. . . .

[*424] Defense: And as I say that, there's this innocence, presumption of innocence, and you can accept that? In other words, you said that one of the things you said that, I think, on the general questions was you sort of require George to get on the stand and prove his innocence. Would you do that? Do you mean that really?

Arthur: I believe that he should bring himself out, if he didn't do it, just testify, tell what happened, you know.

Defense: And that is -

Court: It's time for the court to interrupt. Ms. Arthur, that's not the law, okay? I've sat here plenty of times with a jury and I said to myself it would be nice if this guy would tell what happened. That's not the law. He's not required to do that and he's not required to do anything. He comes in here cloaked with the presumption of innocence. As he sits here now he's presumed innocent and under the Constitution, he's not required to do anything at all. Now, having told you that, can you abide by that and in your mind not require him to do anything? [***10]

Arthur: No, I don't require, but I just think, to tell you the truth, Judge, I don't require, but I just [**27] think if the jury would listen, like everybody says, he wants to have a fair trial. If the jury would listen to both of the lawyers, you

know, and whatever evidence they had to prove him not guilty, I'd sit here and listen to it.

Court: Okay, but my point is that some point the prosecution will stop presenting evidence. At that point, once the state has stopped producing evidence, then the defense may produce evidence, if they so desire.

Arthur: Please?

Court: Once the state has stopped producing evidence, then the defense, I'm talking about Mr. Franklin, through his lawyers, may start producing evidence, if they wish, but they're not required to do that. They're not required to do anything. They could stop right there, if they wanted, have me give them the final instructions and have you go out and make your decision on the case. Arthur: Even if the evidence is not against him, that they have brought evidence to find that he's not guilty.

Court: I missed that. I'm missing out.

Arthur: You said if the law would provide, stop providing evidence. I said even if they're for him and they're not against him, not saying he's not [**28] guilty, but they're proving, have brought evidence? You see what I'm talking about?

Court: I see what you're talking about, but do you see what I'm talking about? That is, they're not required to produce anything. The defendant isn't required to do anything in the trial except show up, do you understand that?

Arthur: Uh huh.

Court: And you're not allowed to hold it against him if he doesn't produce anything. You might be sitting there thinking maybe he could clear something up or maybe another witness could clear something up, but they're not required to do a thing. Can you abide by that and understand that?

Arthur: I guess so, if that's the law.

Court: That's the law. Mr. Schmidt, do you have any further questions?

Defense: I'm still not quite sure, Your Honor. In other words, I guess, Mrs. Arthur, and, again, this is in fairness, being fair to you, too, if we were to try the case and the state put on evidence and George didn't take the stand, would you hold that against him?

Arthur: No, I wouldn't hold it against him.

[*425] Defense: Would you think that would have something to do with his guilt?

[**29] Arthur: No.

Defense: You would think you wouldn't consider that at all? [***11]

Arthur: No, I wouldn't.

. . . .

Defense: . . . The way this goes, Mrs. Arthur, by law and by rules of the court, the State of Ohio has the burden of proving the elements of the crime, all right?

Arthur: Uh huh.

Defense: The state will go first and the law also says that they will go last. They will have the final argument and then the judge will give you the law: do you understand?

Arthur: Uh huh.

Defense: Actually, they will paint a very dark picture or try to paint a dark picture, if they're able. That's their duty. But you've got to keep an open mind until you hear the defense, or you hear the law as it applies to what you heard. Can you do that?

Arthur: Yes, I could.

. . . .

Defense: And if the right thing, if [the death penalty] was the right thing, you would do it, right?

Arthur: That's right.

Defense: What do you consider to be the right thing?

Arthur: Well, what I consider to be the right thing is if justice is done, either way. If he's proven guilty, [**30] then justice is done. If he's proven not guilty, then justice is done.

JA 1093-1108. Defense counsel later passed Juror Arthur for cause.

After the jury was impaneled, a jury view of the scene of the crime was conducted. During the viewing, Juror Arthur asked where "he" got into the house. Afterward, the judge called her into chambers, with the attorneys, and the following conversation took place:

Court: Okay, Mrs. Arthur, the reason we called you in here is because it's been reported back to me that when the jurors were out on the view that you might have asked some questions while you were out there and specifically the way it was put to me was that you may have asked a question something like this: How did he get in? Did he get in through the window downstairs?

Arthur: No, the only thing I asked, I said, I didn't ask if he got in the window downstairs, I asked was that the window he got in, the window when they showed. That's the only thing I asked.

Court: The thing I need to know from you is when you say he, when you're talking about he getting in. I need to know have you formed a predisposition in your mind about this man out here, [**31] Mr. Franklin? [***12]

Arthur: No, I hadn't formed no position. All I just want to know is that was the house. I hadn't formed anything.

Court: Who were you talking about when you said that he?

Arthur: I was talking about him, but I hadn't formed anything yet.

Court: When you talk about him, are you already assuming he broke into the house, Mr. Franklin, the man out here?

Arthur: All I know is they told me he burglarized two places and I didn't know if those were the houses or not.

Court: Well, the fact, if somebody told you he burglarized two places, can you accept the fact

that doesn't mean the man did it, just because somebody said he did it?

Arthur: All I know is what I was told. That's all I know.

[*426] Court: Mr. Schmidt [defense counsel], you want to tell us what your version of it is?

Schmidt: Yes, sir. When we were upstairs Mrs. Arthur said where did he break in and that was all she said.

Arthur: That's all I said. That's all I said. I didn't say anything else.

Court: Okay, are you able to keep an open mind in this case and wait until you hear all the evidence [**32] in this case?

Arthur: Yes, I will, because I hadn't formed nothing.

Court: Counsel, want to ask her any questions? Mr. Rosenwald [defense counsel]?

Rosenwald: . . . . Miss Arthur, who told you he burglarized two places?

Arthur: The only thing I heard, and I might have misunderstood it, I thought she said when we were talking in the room that he had burglarized two places.

Rosenwald: When we were asking the questions of the jurors?

Arthur: That's all I know. Nobody did tell me. That's just what I got from you all.

> Rosenwald: Do you have the impression, feeling, from what you're saying that George did break into two places?
>
> Arthur: I really don't know, sir.
>
> Rosenwald: All right, that's all.
>
> Court: Anything further? Anything you gentlemen want to ask her?
>
> Prosecutor: We were saying that, also. Do you understand that's what he's charged with and now the evidence will show whether he did it or not?
>
> Arthur: Right, that's all I know, I don't know, sir. That's all I know.
>
> [***13]

JA 1551-54. Defense counsel made a motion for a mistrial based upon [**33] Arthur's comments at the jury view. The judge denied the motion, saying, "I believe this jury can be fair and impartial and I heard her answers to the questions and I observed her demeanor . . . ."

Relying on this record, the district court found that Juror Arthur was biased and that therefore a new trial was warranted. We agree with the district judge's conclusion but point out that Juror Arnold was biased because she could not understand the law rather than because she had a preexisting opinion about Franklin.

The Supreme Court has repeatedly held, pre-AEDPA, that juror bias is a factual issue and that reviewing courts must give the factual assessments of the trial judge a presumption of correctness subject to the exceptions enumerated in 28 U.S.C. § 2254(d). *See Thompson v. Keohane*, 516 U.S. 99, 111, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); *Wainwright v. Witt*, 469 U.S. 412, 431, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *Patton v. Yount*, 467 U.S.

1025, 1036, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). The exception relevant in this case is whether "the factual determination is not fairly supported by the record . . . ." 28 U.S.C. § 2254(d)(8)(1994), [**34] amended by 28 U.S.C. § 2254(d)(2).

Under this standard, we cannot hold that the trial judge's decision that Juror Arthur's statement at the jury viewing and her subsequent statements in the conversation with the judge did not indicate bias was not fairly supported by the record. Juror Arthur stated unequivocally that she had not made up her mind about Franklin's guilt. As the Warden points out, Juror Arthur's comments at the viewing could well be understood to indicate that she was asking whether this was the window the prosecution said the defendant had climbed through, without that question indicating that she believed the prosecution's story. After discussing the matter with Juror Arthur, observing her demeanor, and listening to her responses, the trial [*427] judge specifically stated that he believed she could be impartial and fair. As nothing on the record demands that we find otherwise, we are bound to defer to the trial judge's finding.

Juror Arthur's statements at voir dire, however, require a different conclusion because they leave us with the conviction that she so completely misunderstood the presumption of innocence and burden of [**35] proof that she could not have made a fair assessment of the evidence of Franklin's guilt. In her voir dire testimony, Juror Arthur made at least five statements indicating that she did not understand that Franklin was not required to prove himself not guilty:

> 1. [I think he needs to] prove he's innocent.
>
> 2. I believe that he should bring himself out, if he didn't do it, just testify, tell what happened, you know.

> 3. I just think, to tell you the truth, Judge, I don't require, but I just think if the jury would listen, like everybody says, he wants to have a fair trial. If the jury would listen to both of the lawyers, you know, and whatever evidence they had to prove him not guilty, I'd sit here and listen to it.
>
> 4. Even if the evidence is not against him, that they have brought evidence to find that he's not guilty.
>
> 5. If he's proven guilty, then justice is done. If he's proven not guilty, then justice is done.

Three times the judge intervened to explain the law to her. The second two times, during her individual voir dire, she professed-albeit somewhat reluctantly, saying, "I guess so, if that's the law"-to understand the judge's explanations. Yet despite the [**36] judge's repeated attempts to rehabilitate her, the last thing she said in her voir dire was: "If he's proven guilty, then justice is done. If he's proven not guilty, then justice is done." Juror Arthur assured counsel and the judge that she would consider all of the evidence before making a decision, and there is no reason to [***14] disbelieve her. Yet, that she would consider all of the evidence does not remove the fact that she also seemed to expect some of that evidence to come from Franklin by way of proof of his innocence.

In the *Witherspoon* line of cases, the United States Supreme Court has addressed the question of prospective jurors excluded because of their insistence upon or unwillingness to find a sentence of death. *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) ; *Adams v. Texas*, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). Although these

cases dealt with the exclusion of jurors who expressed the opinion that they could not, or might not be able to, follow the law, they [**37] also made the more general point that a jury should be composed of jurors who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Adams*, 448 U.S. at 45. Jurors who cannot apply the law are not impartial. *Wainwright*, 469 U.S. at 423.

Although we normally defer to the assessment of the trial judge, who hears the prospective juror's tone of voice and sees her demeanor, in this case, the cold record alone is so extensive and so persuasive that it outweighs our presumptive deference. Juror Arnold five times gave the definite impression that she could not faithfully apply the law concerning the burden of proof because she failed to understand it. Even after she was corrected [*428] three times by the judge, she still insisted with her last statement that the defendant had to be proven innocent. *Cf. Wainwright*, 469 U.S. at 434 (juror who displayed inability to follow the law four separate times was correctly excused). While we appreciate the judge's attempts to rehabilitate this juror, he had a duty to dismiss a prospective juror who could not follow the law. *Hughes v. United States*, 258 F.3d 453, 464 (6th Cir. 2001). [**38] As such, the trial court's failure to dismiss her constituted manifest error and does not merit the presumption of correctness normally due trial court factual findings. *See Hill v. Brigano*, 199 F.3d 833, 844-45 (6th Cir. 1999).

"The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001) (citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000)). "'Failure to remove biased jurors taints the entire trial, and therefore . . . [the resulting] conviction must be overturned.'" *Ibid.*

(quoting *Wolfe v. Brigano*, 232 F.3d 499, 503 (6th Cir. 2000)). There is no situation under which the impaneling of a biased juror can be excused. "The impaneling of a biased juror warrants a new trial. . . . The 'presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.'" *Ibid.* (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000)). Accordingly, the State can make no argument that Franklin's trial counsel [**39] acted strategically in keeping Juror Arthur on the panel because she was, like Franklin, African-American. To permit this would be to allow trial counsel to waive the defendant's right to an impartial jury. [1] *Ibid.*

The service of a biased juror was a constitutional defect that should have been, but was not, raised [**40] on direct appeal. Consequently, the failure of Franklin's appellate counsel to appeal this issue amounted to ineffective assistance of counsel and allows Franklin to show the prejudice required to overcome his procedural default. [***15]

IV

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[1] However, we note that this holding should not be construed so broadly as to eliminate our usual deference to trial counsel's assumed voir dire strategy. Counsel may well have reasons for wanting jurors who are confused or ignorant, and we do not intend here to give defendants a free pass to argue for ineffective assistance of counsel any time a prospective juror is seated who demonstrates some lack of clarity about the law. We consider the circumstances in this case to merit particular scrutiny because of the length the judge and counsel went to attempt to explain the burden of proof to Juror Arthur and her continued inability to understand that Franklin did not have to prove himself innocent.

The district court found that Franklin's appellate counsel provided ineffective assistance to him during his direct appeal to the Ohio Court of Appeals and to the Ohio Supreme Court by (1) failing to consult with their client, (2) failing to provide him with any real opportunity to participate or have input in his appeal, and (3) failing to raise the issue respecting Juror Arthur's bias on direct appeal.

A criminal appellant is constitutionally entitled to the effective assistance of counsel in his direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003). In *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999), the court attempted to provide a non-exclusive list of factors to consider when defining deficient performance:

> [*429] 1. Were the omitted issues "significant and obvious?"
>
> 2. Was there arguably contrary [**41] authority on the omitted issues?
>
> 3. Were the omitted issues clearly stronger than those presented?
>
> 4. Were the omitted issues objected to at trial?
>
> 5. Were the trial court's rulings subject to deference on appeal?
>
> 6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
>
> 7. What was the appellate counsel's level of experience and expertise?
>
> 8. Did the petitioner and appellate counsel meet and go over possible issues?

> 9. Is there evidence that counsel reviewed all the facts?
>
> 10. Were the omitted issues dealt with in other assignments of error?
>
> 11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Ibid. In addition to the *Mapes* factors, a habeas court may also consider "prevailing norms of practice as reflected in American Bar Association standards and the like." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The ABA Standards for Criminal Justice instruct that "[a]ssigned counsel has a special responsibility to develop a relationship of trust and confidence with the client so that the client will [**42] appreciate that the lawyer knows the case and has the client's best interests clearly in mind." Comment to ABA Standard for Criminal Justice 4-3.8 (2d ed. 1980). Standard 4-8.3 itself states that, "the lawyer has a duty to keep the client informed of the developments in the case and the progress of preparing the defense."

Franklin's appellate counsel made many of the errors included in the *Mapes* list. First, counsel failed to raise the juror bias issue or any of the other issues for which the district court issued a COA. Appellate counsel is, of course, not required to raise every non-frivolous issue on appeal. "As the Supreme Court has recently observed, it is difficult to demonstrate that an appellate attorney has violated the performance prong where the attorney presents one argument on appeal rather than another. In such cases, the petitioner must demonstrate that the issue not presented 'was clearly stronger than issues that counsel did present.'" *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259, 289, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)) (internal citations omitted); *see also McFarland*

v. Yukins, 356 F.3d 688, 710-12 (6th Cir. 2004). [**43] Just as in *Caver*, "in the instant case, there can be little doubt but that the omitted issue . . . was much stronger than the issues [petitioner's] appellate counsel presented." *Ibid.* (footnote omitted). Franklin himself suggested fourteen issues for his attorneys to raise on appeal. Each of these issues found its way into his habeas petition, including the biased juror, *Batson*, and ineffective assistance of trial counsel errors that are on appeal here, while none of the issues counsel raised on appeal made it past the magistrate judge below. His attorneys ignored his suggestions, telling him they were frivolous, had already been litigated, or could be raised on post-conviction review. They also failed to tell Franklin that he could file a pro se supplementary brief raising additional issues they refused to include. [***16]

More egregious, appellate counsel never met Franklin or even spoke to him over the telephone. His lead counsel, Roxann Dieffenbach, only corresponded with him through letters. His other counsel, Candace [*430] Greenham, had no contact with him at all. Between December 4, 1989, and November 26, 1991, Dieffenbach's total communication with Franklin consisted [**44] of 26 letters, none longer than one page. Her first letter, sent on December 4, 1989, and thus her first contact with Franklin, came eleven months after she had been appointed to represent him and three weeks before she had to file his brief with the Court of Appeals. Although she asked him for input on the brief, she failed to respond to his December 19, 1989, request for a copy of his transcript until April 22, 1990, and she only sent him a copy of the Court of Appeals brief one month after it had been submitted to the court.

Twice Franklin asked Dieffenbach to withdraw from his case. The first time she responded only by saying the she had argued his case before the Court of Appeals. The second time she responded only by saying that she had argued his

case before the Ohio Supreme Court. At no point, therefore, did Franklin's counsel meet the ABA guidelines of keeping Franklin "informed of the developments in the case" or of developing a relationship of trust with him.

Counsel also failed adequately to represent Franklin at oral argument before the Ohio Court of Appeals. The night before the argument before the Court of Appeals, Greenham had a family emergency and could not attend [**45] the argument. The court denied Dieffenbach's request for an extension. At oral argument, Dieffenbach refused to discuss or answer questions on any part of the brief that Greenham had prepared. Having counsel refuse to address half of the issues raised before the appellate court is like having trial counsel refuse to attend half the trial. On those issues, therefore, Franklin suffered a total lack of meaningful advocacy. *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

Before the Ohio Supreme Court, counsels' behavior was unprofessional. As the magistrate judge wrote,

> The transcript of their arguments include five instances of wholly inappropriate laughing on the part of both of Franklin's lawyers, an admission by Dieffenbach that she may be wrong about one of her contentions, equivocal responses to questions from the justices, and Greenham's introductory statement that she "wished we had more to say on Mr. Franklin's behalf." In addition, Franklin's counsel displayed a lack of familiarity with the facts relevant to the arguments she made to the court. For instance, Greenham did not recall the length of the videotape she argued was gruesome and prejudicial, [**46] and stated that "apparently it was very graphic," strongly suggesting she had not even viewed the allegedly

> offending videotape herself. Dieffenbach did not know how many points of identification existed between Franklin's fingerprint and the print lifted from the champagne bottle found in the Strauss apartment. Greenham displayed an astounding lack of solemnity under the circumstances when she employed the term "overkill" to describe the photographic and videographic evidence, then laughed and said "Excuse the pun."

JA 615.

There is, thus, no question that Franklin's appellate counsels' performance was deficient. Although we do not believe that appellate counsels' shortcomings at oral argument necessarily prejudiced Franklin, we find that counsel did not meet the ABA standards in their dealings with him concerning his appeals, and we hold that the failure to raise the biased juror issue on appeal was prejudicial, since no claims of [*431] strategy can excuse the seating of a juror unable to follow the law. [***17]

V

In sum, Franklin's ineffective assistance of counsel claim is not procedurally defaulted because the Ohio Court of Appeals's refusal to hear Franklin's Motion [**47] for Reconsideration was not based on an adequate and established state procedural rule and because his appellate counsels' failure to raise the constitutionally defective service of a biased juror rose to the level of prejudice. Therefore, we AFFIRM the district court's grant of habeas corpus and decline to consider Franklin's cross-appeals on the three issues certified for appeal.

DISSENTBY: ALICE M. BATCHELDER

ALICE M. BATCHELDER, dissenting. I respectfully dissent. I would hold that Franklin's claims should be

dismissed for procedural default under *Maupin v. Smith* because Ohio's First District Court of Appeals relied on independent and adequate state grounds when it denied Franklin's Application for Delayed Reconsideration. 785 F.2d 135 (6th Cir. 1986). Franklin clearly failed to comply with a state procedural rule that was both applicable to his case and enforced by Ohio courts.[1]

The majority holds that the third prong of the *Maupin* test was not satisfied due to uneven application of the good cause exception, but prior Sixth Circuit cases suggest otherwise. Under that prong of the test, this court must decide whether the procedural rule relied upon by the state is an "'adequate and independent' state ground on which the state can rely to foreclose review of a federal constitutional claim." *Maupin*, 785 F.2d at 138. To be "independent," the procedural rule must rely in no part on federal law. *Coleman v. Thompson*, 501 U.S. 722, 732-33, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To be "adequate," the rule must have been firmly established and regularly followed by state courts at the time of its application to Franklin. *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991). A rule is firmly established if, at the time of the petitioner's actions giving rise to the default, the petitioner could be deemed to have been apprised of the rule's

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[1] Although the majority asserts that the *Murnahan* rule was not enforced by Ohio courts, it cites nearly a dozen cases enforcing the rule over the five-year period immediately following Franklin's motion. Furthermore, Sixth Circuit precedent establishes that the rule was applied in Hamilton County, where Franklin appeared, as early as 1983. *See Sowell v. Bradshaw*, 372 F.3d 821, 827 n.2 (6th Cir. 2004) (citing *Ohio v. Rone*, 1983 Ohio App. LEXIS 11867, No. C-820640, 1983 WL 5172, at *4 (Ohio Ct. App. Aug. 31, 1983)).

existence. *Hutchison v. Bell*, 303 F.3d 720, 737 (6th Cir. 2002). Finally, whether a rule is regularly followed is determined as of the date of the petitioner's [**49] conviction. *Rogers v. Howes*, 144 F.3d 990, 994 n.5 (6th Cir. 1998).

This circuit's precedent reveals that the rule applied to Franklin was both independent and adequate at the time of its application. Significantly, Franklin's case arose in Hamilton County. In *Sowell v. Bradshaw*, this court declined to review an ineffective assistance claim based on a Rule 26 procedural bar. 372 F.3d 821, 827 n.2 (6th Cir. 2004). We held that "the procedure required by *Murnahan* was the procedure that had been required since at least 1983 by the Ohio Court of Appeals in Hamilton County, where [the petitioner's] trial and appeal were conducted." *Id.* (citing *Ohio v. Rone*, 1983 Ohio App. LEXIS 11867, No. C-820640, 1983 WL 5172, at *4 (Ohio Ct. App. Aug. 31, 1983)). In *Coleman v. Mitchell*, we held that "before the Ohio Supreme Court's decision in *Murnahan*, it was well established in [Hamilton County], [*432] the appellate district in which Coleman's appeal was heard, that claims of ineffective assistance of appellate counsel were to be raised in a delayed motion for reconsideration and were not cognizable in state post-conviction proceedings." 244 F.3d 533, 540 (6th Cir. 2001). [**50] In *Hicks v. Collins*, we held that a petitioner had procedurally defaulted his ineffective assistance of appellate counsel claim because *Murnahan*'s rule was "well settled" in Hamilton County by September of 1992 and was therefore an independent and adequate state ground. 384 F.3d 204, 212 (6th Cir. 2004). Based on the foregoing, there is no question that Ohio courts' application of *Murnahan*'s good cause exception does not fail the third prong of the *Maupin* test.

The majority attempts to distinguish Hicks by noting that the petitioner in that case filed his motion prior to the *Murnahan* decision, which the majority views as overriding

the ten-day period allotted to motions for reconsideration. I think the majority over-states *Murnahan*. That case explicitly stated that motions such as Franklin's should be filed "in the court of appeals where the [***19] alleged error took place pursuant to App. R. 26 . . . ." *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204, 1209 (Ohio 1992). In light of the court's directive, it cannot be said that Franklin was not apprised of the rule for purposes of the Hutchison and Ford cases. [**51] The fact that Rule 26 was later amended to extend the filing period is irrelevant. Consequently, there is little to distinguish Franklin's case from the Hicks case. I would hold that his claims are procedurally barred.

APPENDIX B

GEORGE T. FRANKLIN,

Petitioner-Appellee/Cross-Appellant,

v.

CARL S. ANDERSON, Warden, Respondent-Appellant/Cross-Appellee.

Nos. 03-3636/03-3697
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
434 F.3d 412
May 9, 2006, Decided

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

APPENDIX C

GEORGE T. FRANKLIN,

Petitioner,

v.

CARL S. ANDERSON, WARDEN,

Respondent.

Case No. C-1-95-1007
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
267 F. Supp. 2d 768
March 31, 2003, Decided

Petitioner George Franklin ("Franklin" or "Petitioner") was charged with one count of aggravated murder, with death penalty specifications, arising out of the homicide of Gerald Strauss ("Strauss"), as well as two counts of burglary. His case was assigned to Judge Ralph Winkler of the Hamilton County Common Pleas Court. On December 7, 1988, a jury in Hamilton County convicted him of those offenses. On December 12, 1988, the penalty phase of Franklin's trial occurred, with the jury finding that the state had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors and returning a recommendation that the death penalty be imposed. Thereafter, Judge Winkler conducted his own independent review of the evidence and found that the state had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. Accordingly, the trial court sentenced Franklin to death.

In accordance with Ohio law as it [**4] then stood, Petitioner appealed to the Hamilton County Court of Appeals. That appellate court rejected Franklin's assignments of error and, after conducting its own independent review of the evidence, concluded that the state had proved beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors. *State v. Franklin*, 1990 Ohio App. LEXIS 3385, 1990 WL 117140 (Ohio App. 1990). Thus, the court of appeals affirmed Franklin's conviction and the death penalty imposed upon him. The Petitioner appealed that decision to the Ohio Supreme Court, which affirmed the Hamilton County Court of Appeals. *State v. Franklin*, 62 Ohio St.3d 118, 580 N.E.2d 1 (1991), *cert. denied*, 504 U.S. 960, 119 L. Ed. 2d 235, 112 S. Ct. 2315 (1992). The Ohio Supreme Court also independently weighed the aggravating circumstances and mitigating factors, concluding that the state had met its burden of proof in that regard. In its decision, the Ohio Supreme Court summarized the facts and circumstances surrounding the crimes for which the Petitioner was convicted:

> About 4:00 p.m. on July 21, 1988, Rosha Winston returned to her one-room apartment on Eden Avenue in Cincinnati to [**5] find that her TV set had been taken. A framed picture and some decorative glass dishes had been moved from the top of the TV and placed on the kitchen table. A window screen at the rear of the apartment had been partly [*772] torn out and the windowsill had mud on it.
>
> The window that had a torn screen was about six feet off the ground from the outside. Police noticed a circular imprint made in the muddy ground under the window. The circle was thought to have been made by a metal garbage can, on which the burglar stood to reach the window.

Several metal cans sat on concrete across the driveway separating Winston's apartment from the building next door. One of the cans had mud around the top. A large barking dog, chained to a nearby handrail, prevented police from approaching the cans.

Winston told police she suspected George Franklin, a neighbor, of the burglary. Franklin lived in an apartment next door with his grandfather. When questioned by police on the same day as the burglary, Franklin used the name of George Fichtel. Franklin appeared nervous, and wanted to know what evidence the police had. He admitted that the dog belonged to his grandfather, and controlled it long enough for the [**6] officer to inspect the garbage cans.

Police found Franklin's fingerprint on the picture that had been on top of the stolen TV. By the time police identified Franklin as the burglar, he had disappeared.

On or about July 23, 1988, Gerald R. Strauss and his fiancee Karen Strain moved into a townhouse on Corry Street in Cincinnati. On Saturday, August 6, 1988, Strauss and Strain picked up Richard Thompson, a friend of Strauss, at the airport. The next morning, Strain left on a business trip. Thompson and Strauss spent the day in various activities, including a cookout on the apartment patio. Strauss dropped Thompson off in downtown Cincinnati at around 10:00 that evening.

At about 10:30 p.m. a neighbor, Leonard Bass, saw Strauss cleaning the patio and apartment. Shortly after 11:00 Bass saw Strauss go upstairs,

and saw lights turned off in the apartment. Another neighbor, Catherine Schaffner, while out walking her dog between 11:00 and 11:30, heard a "horrible," "very loud, very forceful" scream that lasted two or three seconds. The sound seemed to come from the direction of Strauss's building. A few minutes later, after Schaffner got home, her dog started barking which usually indicated [**7] a stranger passing close to the house.

The next morning Mitch Walker, a co-worker at Proctor & Gamble, tried to call Strauss when he did not show up for work. After getting busy signals, Walker asked the operator to break in. The operator determined that the phone was off the hook. Walker then drove to Strauss's townhouse, and found the front door ajar. He asked a police officer to investigate. The officer entered the townhouse and found Strauss's body in an upstairs bedroom.

The coroner arrived that morning and concluded that Strauss had been dead six to eighteen hours. Upon laboratory examination, the body revealed bruises on the right hand; lacerations, broken bones and a crushed eyeball from two blows to the face; and lacerations and broken bones from a large number of blows to the back of the head. The cause of death was bone fragments driven into the brain. The wounds were described by the coroner as consistent with having been caused by a claw hammer.

According to both Thompson and Strain, Strauss had left a Marion brand claw hammer in the upstairs guest bedroom. The hammer was not found in the house. Other, items were missing

[*773] from the house, including Strauss's money clip [**8] with several twenties, his credit cards, his watch, a VCR, and a briefcase with personal papers. In a wooded area a few blocks away, police found the briefcase and personal papers, credit cards, and a placemat that matched others in the townhouse. Assisted by a tracking dog, the police found a bloodstained Marion brand claw hammer in the woods. The VCR, watch, money clip and money were never recovered, despite the offer of a reward.

A screen had been torn out in a patio window of the townhouse. Karen Strain testified that she and Strauss kept an empty champagne bottle as a souvenir on the inside sill of that window. When police found the body, the bottle had been carried upstairs and left in the guest bedroom.

The police noticed a similarity to the Winston burglary. Both crimes occurred in the same neighborhood, within seventeen days of each other. A TV was taken from Winston, a VCR from Strauss, and both entries had been obtained by tearing or cutting a screen from a rear window. A latent fingerprint lifted from the champagne bottle in the Strauss townhouse matched Franklin's known prints.

Police traced Franklin to the apartment of a Glenn Davis. When officers arrived on August [**9] 18, Davis answered the door and said he lived there with his cousin, Gerald Evans. The police recognized "Gerald Evans" as Franklin and arrested him.

Michael Turnbolt, who spent the evening of the Strauss murder, August 7, with Franklin, testified

> that both had been using drugs. Franklin left at about 10:30 p.m., at which time he apparently had no money. Franklin returned and woke Turnbolt at about 2:30 a.m. Turnbolt described this as unusual. Franklin had changed his shirt, and had $ 100 to $ 150, which he later used to purchase a gram of cocaine.

Id. at 118-20, 580 N.E.2d at 3-4.

Thereafter, Franklin continued to attempt to secure relief in the Ohio courts, by seeking post-conviction relief pursuant to Ohio Revised Code § 2953.21, as well as by requesting that the Ohio Supreme Court recall its mandate and permit supplemental briefing. The Ohio Supreme Court denied Petitioner's requests, without an opinion. *State v. Franklin*, 63 Ohio St.3d 1402, 585 N.E.2d 424 (1992). In addition, Franklin's petition for post-conviction relief was denied by the Hamilton County Common Pleas Court without an evidentiary hearing, [**10] a decision which was affirmed by the Hamilton County Court of Appeals. *See State v. Franklin*, 1995 WL 6281 (Ohio App.), appeal not allowed, 72 Ohio St. 3d 1538, 650 N.E.2d 479, *cert. denied*, 516 U.S. 950, 133 L. Ed. 2d 315, 116 S. Ct. 394 (1995).

After having exhausted his available state remedies, Petitioner initiated this action, requesting a writ of habeas corpus, alleging that his convictions and sentences violated a number of provisions of the United States Constitution. In his Petition (Doc. # 5) and Amended Petition (Doc. # 25), the Petitioner set forth 28 separate grounds or claims for relief. This Court referred the matter to Magistrate Judge Michael Merz for a Report and Recommendations. On August 21, 2002, after having conducted an evidentiary hearing, Judge Merz issued his Report and Recommendations. *See* Doc. # 105. In particular, that judicial officer recommended that the Court grant the requested writ of habeas corpus on the Sixth

Claim and that it deny such relief with [*774] respect to the other 27 claims.[1] Both the Respondent (Doc. # 106) and the

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[1] With his Sixth Claim, the Petitioner alleged that his convictions and sentences are unconstitutional, as a result of the fact that one of the jurors was biased, rather than being impartial. Although the Petitioner had not raised that claim during his direct appeals, Judge Merz concluded that this claim was not barred by procedural default, because Petitioner's appellate counsel were constitutionally ineffective as a result of their failure to raise that issue during Petitioner's direct appeals. The ineffective assistance of counsel provided cause and prejudice, excusing the procedural default. With his First Claim, the Petitioner asserted that his convictions and sentences violated the constitution because of the failure of his appellate counsel to render effective assistance. The First Claim was based, inter alia, upon the failure of appellate counsel to raise the issue of the biased juror during his direct appeals. Judge Merz also recommended that the Court grant Petitioner the requested relief on that aspect of his First Claim. Judge Merz also noted that appellate counsel had failed to consult with their client and by failing to afford him an opportunity to have input in his appeals. Since both this aspect of the Petitioner's First Claim and his Sixth Claim are predicated upon the assertions that he was denied effective assistance by his appellate counsel and that his constitutional right to an impartial jury was infringed by the presence of a biased juror on the panel which convicted him and recommended that he be sentenced to death, the Court will discuss those issues only in connection with the Sixth Claim. If it concludes that the Petitioner is entitled to the requested relief on his Sixth Claim, it will also award him relief on the corresponding aspect of his First Claim, without expressly discussing that claim further. [**12]

Petitioner (Doc. # 108) filed Objections to that judicial filing.[2] Thereafter, Judge Merz filed an Amended [**11] Supplemental Report and Recommendations,[3] in which he reaffirmed his earlier judicial filing and recommended that the Court overrule both parties' Objections. *See* Doc. # 112. The Petitioner, in turn, filed Objections to the Amended Supplemental Report and Recommendations of the Magistrate Judge. *See* Doc. # 114.

[**12]

The Court begins by setting forth the standard of review it must apply when it reviews Reports and Recommendations of a Magistrate Judge in a habeas corpus proceeding. The Sixth Circuit has indicated that a District Court must apply a de novo standard of review to such a judicial filing. *Flournoy v. Marshall*, 842 F.2d 875 (6th Cir. 1988). Accordingly, this Court reviews both Judge Merz' factual findings and his legal conclusions de novo.

Herein, the Court rules upon the parties' Objections to the Report and Recommendations and the Petitioner's Objections [**13] to the Amended Supplemental Report and Recommendations. In addition, the Court decides whether Petitioner is entitled to a certificate of appealability on any claims upon which he is deemed to be not entitled to relief.

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[2] Each of the parties filed a memorandum in opposition to the other's Objections. See Docs. # 109 (Respondent's Reply to Petitioners Objections) and # 110 (Petitioner's Reply to Respondent's Objections).

[3] That judicial filing was preceded by Judge Merz's Supplemental Report and Recommendations (Doc. # 111). Since Judge Merz's Amended Supplemental Report and Recommendations (Doc. # 112) superceded his Supplemental Report and Recommendations (Doc. # 111), the Court does not discuss the latter filing further.

The requirement for such a certificate is found in 28 U.S.C. § 2253(c), which provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> [*775] (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *Slack v. McDaniel*, 529 U.S. 473, 146 L. Ed. 2d 542, 120 S. Ct. 1595 (2000), the Supreme Court explained that an applicant for a certificate of appealability could make "a substantial showing [**14] of the denial of a constitutional right," as required by § 2253(c)(2), in accordance with the standard adopted in *Barefoot v. Estelle*, 463 U.S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983).[4] 529 U.S. at 483-84.

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[4] In *Slack*, the Supreme Court also held that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), with its requirement that a petitioner obtain a certificate of appealability, was applicable when a appeal was sought after the effective date of that statute, even though the petition for a writ of habeas corpus had been requested before that effective date. 529 U.S. at 481-82. Since an appeal of this

The Slack Court explained that when the District Court has rejected a petitioner's constitutional claim on the merits, he must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. With respect to instances in which the District Court denies relief on procedural grounds, the *Slack* Court held:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Id. In *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), [**15] the Supreme Court reaffirmed the standards for the granting of a certificate of appealability that had been established in Slack.

Initially, this Court must decide whether the version of 28 U.S.C. § 2254(d), added by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, is applicable herein. In *Lindh v. Murphy*, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997), the [**16] Supreme Court held that the amended version of § 2254(d) did not apply to a request for habeas corpus which was already pending on the day that the AEDPA became effective, April 24, 1996. Herein, Franklin's request for such

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Court's decision will occur after the effective date of the AEDPA, the requirement that a certificate of appealability be obtained is applicable herein.

relief was pending on that date, given that he filed his Petition for a Writ of Habeas Corpus (Doc. # 5) on November 14, 1995. Consequently, the version of § 2254(d) added with the AEDPA is inapplicable, and this Court applies the pre-amendment version of § 2254(d). In *Mapes v. Coyle*, 171 F.3d 408 (6th Cir.), *cert. denied*, 528 U.S. 946, 145 L. Ed. 2d 284, 120 S. Ct. 369 (1999), the Sixth Circuit reiterated that under the pre-AEDPA version of § 2254(d), state court findings of historical facts are presumed to be correct and are rebuttable only in certain circumstances. *Id.* at 413. Moreover, an individual seeking a writ of habeas corpus must rebut the presumption of correctness by clear and convincing evidence. *Id.*

As a means of analysis, the Court will initially rule upon Petitioner's Objections, [*776] following which it will turn to those submitted by the Respondent. However, since there is a question as to whether the Petitioner's [**17] claims are barred by procedural default, the Court will set forth the standards it must apply to decide whether a claim is barred by the doctrine of procedural default, before addressing the Objections.

I. Standards to Determine Procedural Default

In *Wainwright v. Sykes*, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), the Supreme Court held that, in the absence of cause and prejudice, a District Court cannot grant a writ of habeas corpus, when the state courts have refused to address the merits of a federal constitutional argument, on the ground that the defendant failed to follow a state procedural requirement. Thus, in *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000), the Sixth Circuit noted that "we have consistently held that, absent cause and prejudice, 'a federal habeas corpus petitioner who fails to comply with a state's rules of procedure waives his right to federal habeas corpus review.' *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir.

1996)." In *Wickline v. Mitchell*, 319 F.3d 813 (6th Cir. 2003), the Sixth Circuit reiterated the four part test, adopted in *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986), [**18] by which a court determines whether a claim has been procedurally defaulted:

> First, the court must determine whether there is a state procedural rule that is applicable to the petitioner's claim and with which the petitioner failed to comply.[*Maupin*, 785 F.2d] at 138. "Second, the court must decide whether the state courts actually enforced the state procedural sanction." *Id.* Third, the court must determine whether the state procedural rule "is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim." *Id.* (internal quotation marks omitted). "A procedural rule is adequate only when it is firmly established and regularly followed at the time it was applied ... [and is] an independent basis for disposition of a case if the state courts actually relied on the procedural bar." *Williams v. Coyle*, 260 F.3d 684, 693 (6th Cir. 2001). Finally, if the court answers the first three questions in the affirmative, it will not review the procedurally defaulted claim unless the petitioner can show cause for not following the procedural rule and actual prejudice resulting from the alleged constitutional [**19] violation. *Maupin*, 785 F.2d at 138-39.

Id. at 818 n. 2. *Accord, Jamison v. Collins*, 291 F.3d 380, 385-86 (6th Cir. 2002); *Cooey v. Coyle*, 289 F.3d 882, 897-98 (6th Cir. 2002). This Court must look to the last, explained state court decision to determine whether a claim has been procedurally defaulted. *Wickline*, 319 F.3d at 818.

II. Petitioner's Objections (Doc. # 108) to Report and Recommendations (Doc. # 105) and Petitioner's Objections (Doc. # 114) to Amended Supplemental Report and Recommendations (Doc. # 112)

As is indicated above, the Magistrate Judge recommended that this Court deny 27 of Petitioner's 28 claims. The Petitioner has objected to the Magistrate Judge's recommendations concerning six of his claims. He has not objected to Judge Merz' recommended denial of the Fourth, Seventh, Ninth through Twelfth, Fourteenth through Nineteenth and Twenty-First through Twenty-Eighth Claims.[5] [*777] Based upon its own, independent review of the record, this Court concurs with Judge Merz's recommendation that the Petitioner be denied relief on those 20 claims. Accordingly, the Court adopts the Report [**20] and Recommendations (Doc. # 105), as that judicial filing relates to the Petitioner's Fourth, Seventh, Ninth through Twelfth, Fourteenth through Nineteenth and Twenty-First through Twenty-Eighth Claims. In addition, since the Petitioner has not shown that reasonable jurists would find this Court's assessment of those 20 claims debatable or

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[5] As is indicated previously, Judge Merz recommended that the Court grant relief to the Petitioner on the aspect of his First Claim with which he raised the issue of juror bias. *See* Footnote 1, *supra*. The Petitioner has not objected to the recommendation of the Magistrate Judge that he be denied the requested relief on the remaining aspects of that claim. Based upon its independent review of the record, this Court concurs with that recommendation and will decline to issue a certificate of appealability on same.

wrong, the Court will not award a certificate of appealability for any one or more or all of those 20 claims.[6]

[**21]

The Petitioner has objected to the Initial and Amended Supplemental Reports and Recommendations with regard to the Second, Third, Fifth, Eighth, Thirteenth and Twentieth Claims. As a means of analysis, the Court addresses the parties' argument relating to those six claims in the above order, discussing the Eighth and Thirteenth Claims together, as does Franklin.

A. Second Claim

With this claim, Petitioner contends that his convictions and sentences were obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, because the attorneys representing him during his trial failed to provide effective assistance of counsel. In his Objections, the Petitioner contends that the performance of his trial counsel was deficient in preparation for the guilt phase of his trial, because they failed to canvass the neighborhood where Strauss lived and was murdered. Doc. # 108 at 1-3; Doc. # 114 at 2-4. According to Franklin, such a canvassing would have led to the discovery of Jay Lazarus, who would have testified that he had seen someone on the east side of Strauss' condominium around the time that he was murdered and that he thinks he saw another individual in the vicinity [**22] of

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[6] Parenthetically, it would be futile to grant a certificate of appealability on any one or more or all of those 20 claims, since objecting to a Magistrate Judge's Report and Recommendations is a predicate to appellate review. *See Thomas v. Arn*, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).

Strauss' condominium later that night. *Id.* Petitioner states that neither of the individuals seen by Jay Lazarus looked like him. In addition, Petitioner contends that his trial counsel was ineffective because they failed to obtain an expert who could have challenged the Prosecution's evidence relating to the fingerprint retrieved from the champagne bottle in Strauss' condominium. Doc. # 108 at 3-6; Doc. # 114 at 4-7. Franklin also challenges the performance of his counsel during the penalty phase of his trial. He charges them with failing to conduct a meaningful investigation prior to the penalty phase and, thus, failing to introduce the following evidence, to wit:

> 1. Franklin's parents separated when he was an infant, and his father has had a number of girlfriends, fathering children with a number of those relationships. Additionally, Petitioner had minimal contact with his father during his childhood, who was uninvolved in his discipline.
>
> 2. Franklin also had minimal contact with his mother, who worked full-time [*778] for Ford Motor Company as well as other jobs on a part-time basis. As a consequence, she did not have the energy to discipline her son and tended to [**23] give him money and other material objects to compensate for her lack of personal contact with him.
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> 3. Since his mother and father did not spend time with Petitioner during his childhood, he was raised by his grandmother and great grandmother, who used a "switch" to discipline him.
>
> 4. Franklin was a hyperactive child who would attempt to put sugar on his vegetables. His mother had to keep him away from sweets.

5. Franklin had a bowel control disorder, which persisted into his teenage years and required him to wear a diaper. This subjected him to ridicule, and he occasionally skipped school to avoid the ridicule.

6. Petitioner's mother has a history of psychiatric illness, including two hospitalizations for depression which occurred after the Petitioner had been convicted and the jury had recommended that he be sentenced to death. [7]

7. At the age of 15, Franklin was referred to a rehabilitation program, after having been arrested for selling marijuana.

8. Petitioner's mother sent him to live with his grandfather during his junior year, since she did not believe that she was able to provide him with appropriate discipline. Moving to live with his grandfather [**24] caused Franklin to transfer schools. He was unable to keep up with the demands of his new school, which resulted in his failing. His failure made him ineligible to participate in sports which infuriated him. Franklin lost all motivation for school and began spending time with his cousin who was no longer in school and was involved in criminal activities. Petitioner dropped out of school at the end of his junior year.

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[7] The Petitioner was convicted and the jury recommended that he be sentenced to death in December, 1988. His mother was hospitalized in 1989 and 1991.

> 9. The administration of the Wechsler Adult Intelligence Scale-Revised showed that the Petitioner's intellectual functioning fell in the low average range. In addition, his vocabulary and mathematical skills are limited. He tends to have difficulty with abstract concepts, and his poor performance in school reflects both limited ability and limited skills. An area of potential strength is Petitioner's ability to understand social situations and to establish a conventional response to a social dilemma. In light of his overall performance, however, it is likely that Petitioner may have difficulty applying this knowledge and may act inappropriately in spite of his social awareness.
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> 10. Petitioner's employment history included a stint with a bakery and brief periods [**25] with different fast food restaurants. His longest period of employment was for approximately one year in the dietary department of a nursing home. Petitioner enjoyed working with and talking to the elderly residents of that facility. As a consequence, he pursued certification as a nursing assistant when he joined the Job Corps.

Doc. # 108 at 7-9; Doc. # 114 at 7-9.

As a means of analysis, the Court will initially set forth the standards which it must apply to determine whether the Petitioner's convictions and sentences are unconstitutional, due to the alleged ineffectiveness of his trial counsel, following which it will apply those standards to the [*779] alleged shortcomings of counsel set forth above.

In *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), the Supreme Court set forth the standards which must be applied whenever [**26] a person

convicted of a crime asserts that he was denied effective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In *United States v. Fortson*, 194 F.3d 730 (6th Cir. 1999), the Sixth Circuit elaborated upon the first prong of that test:

> We "presume from the outset that a lawyer is competent, and[,] therefore, 'the burden rests on the accused to demonstrate a constitutional [**27] violation.'" Pierce, 62 F.3d 818, 833 (quoting *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)). Moreover, in applying *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

> The trial process contains a myriad of complex decisions that, for strategic reasons, are sound when made, but may appear unsound with the benefit of hindsight. The defendant, thus, must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (citation omitted).

Id. at 736.

The Court cannot conclude that the failure of trial counsel to canvass the neighborhood in which the murder occurred and, thus, their failure to discover Jay Lazarus, rendered their performance deficient. As is discussed below, Petitioner's trial counsel requested on two occasions that an investigator be appointed at public expense. However, those requests were rejected by Judge Winkler. The Petitioner has cited no authority for the proposition that, [**28] in order to avoid being deemed to be constitutionally deficient, counsel, who have unsuccessfully attempted to secure the services of an investigator, must themselves canvass the neighborhood in which a crime occurred, in order to discover unknown witnesses who may be able to provide exculpatory testimony. This is not an instance where a criminal defendant's trial counsel neglect to interview witnesses who have been identified to them. On the contrary, trial counsel did not know that Jay Lazarus existed or that he could have provided testimony which the Petitioner believes to be exculpatory.[8]

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[8] As is discussed below, the prosecution was aware of Jay Lazarus. Petitioner contends that the prosecution violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and its progeny, by failing to disclose the information Jay Lazarus gave to police officers. That failure is part of the Petitioner's Eighth and Thirteenth

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[*780] With respect to the failure of trial counsel to obtain an expert to challenge the fingerprint evidence, the Petitioner suggests that the state's evidence concerning the fingerprint went unchallenged, as a result of trial counsel's failure to secure an expert. Judge Merz concluded that, assuming for sake of argument that this claim was not procedurally defaulted, the representation by trial counsel was not deficient, because they adequately challenged that evidence through the cross-examination of the prosecution witnesses. Doc. # 105 at 203. The Magistrate Judge also pointed out that the Petitioner had failed to explain what favorable evidence would have been brought out, if a fingerprint expert had been retained. *Id.* Thus, the prejudice prong of *Strickland* was not met. *Id.* This Court agrees with Judge Merz's reasoning in that regard and concludes that, assuming the Petitioner's ineffective assistance of trial counsel claim predicated upon their failure to obtain a fingerprint expert has not been procedurally defaulted, trial counsel's performance was not deficient and there is no showing that the failure to obtain such a witness caused the Petitioner to suffer prejudice. [**30]

With respect to the alleged shortcomings of trial counsel in the penalty phase of the trial, some of the information which Petitioner claims his counsel should have presented during the penalty phase was presented during that

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Claims, which are discussed below. Parenthetically, the Court concludes that the prosecution did not violate *Brady* in that regard, because the information Jay Lazarus would have provided was not material. Based upon that same reasoning, the Jay Lazarus information would not be material under a Strickland analysis.

phase of the trial. Thus, as Judge Merz pointed out, the jury was informed during the penalty phase that Franklin's parents were separated when he was young, that he had a bowel disorder, that he had moved in with his grandfather during his teen years as a result of his mother's inability to control him and that he enjoyed his job in the nursing home working with the elderly residents. In addition, the jury was informed about his overall work history. Doc. # 105 at 209. The fact that trial counsel failed to present evidence during the penalty phase of the hospitalizations of Petitioner's mother for depression does not constitute deficient performance, since those hospitalizations occurred, after the penalty phase of the trial occurred. With respect to the other alleged shortcomings of counsel, Judge Merz pointed out that Franklin had the burden of proving that the performance of his trial counsel was deficient, as a result of their failure to conduct an adequate [**31] investigation. Doc. # 105 at 210. Even though trial counsel testified during the evidentiary hearing, Judge Merz noted that they were not asked to describe the steps they took to investigate the mitigation factors which could be presented to the jury during the penalty phase or whether any tactical or strategic reasons had caused them to omit any of these matters from their presentation to the jury. *Id.* Thus, the Magistrate Judge concluded that the Petitioner had failed to show that trial counsel failed to "make some effort at an independent investigation in order to make a reasoned, informed decision" (*Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000)) respecting the presentation of such evidence during the penalty phase. This Court concurs fully with the Magistrate Judge's reasoning in that regard. Moreover, even if it disagreed, the Petitioner would not be entitled to the requested relief. A claim of ineffective assistance of counsel requires that prejudice be demonstrated, in addition to showing that counsel's performance was deficient. Simply stated, this Court [*781] cannot conclude that the alleged shortcomings

of trial counsel during the penalty phase resulted [**32] in a trial the result of which was not reliable.

In sum, the Court concludes that the Petitioner was not denied effective assistance of counsel during his trial. Accordingly, the Court overrules Petitioner's Objections (Docs. # 108 and # 114) to the Report and Recommendations (Doc. # 105) and Amended Supplemental Report and Recommendations (Doc. # 112), as they relate to the Second Claim. However, since "reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong," the Court will grant a certificate of appealability on this claim.

B. Third Claim

With his Third Claim, the Petitioner contends that his convictions and death sentence are void, because the trial court refused to appoint an investigator, in violation of the Due Process Clause of the Fourteenth Amendment.[9] Judge

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[9] In support of this claim, the Petitioner also cites the Equal Protection Clause of the Fourteenth Amendment, as well as the Fifth, Sixth and Eighth Amendments. Given that this claim is based upon *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), wherein the Supreme Court held that the Due Process Clause requires that the prosecution provide expert assistance to an indigent defendant under certain circumstances, and, further, since the Petitioner has failed to cite authority in support of the other constitutional provisions, the Court limits its discussion to the question of whether the denial of an investigator constituted a denial of due process in violation of the Fourteenth Amendment. The Petitioner also cites provisions of Ohio law to support this claim. However, since a federal court cannot issue a writ of habeas corpus on the basis of "a perceived error of state law," (*Pulley v. Harris*, 465 U.S. 37,

Merz recommended that the Court deny this claim, because the Petitioner had not exhausted it and could not demonstrate cause and prejudice, given that the failure to appoint an expert did not deprive him of due process of law. *See* Doc. # 105 at 53-57. For reasons which follow, this Court agrees. The Court begins by examining the right the Petitioner [**33] seeks to enforce with this claim.

[**34]

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), *Ake* was charged and convicted of two counts of capital murder. Prior to his trial, *Ake's* counsel had indicated that his client wanted to raise an insanity defense and requested that the court appoint a psychiatrist or provide funds for one, since his client was indigent and without funds to hire such an expert. The trial court denied that request and the Oklahoma appellate court affirmed. Upon further appeal, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment mandates that the state provide a psychiatrist's assistance to an indigent defendant who "has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." *Id.* at 74. *Ake* had made such a showing, since he was found to be incompetent to stand trial shortly after having been arrested, being diagnosed as a paranoid schizophrenic, and was returned to competence as a result of being prescribed an antipsychotic drug. In *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003), the Sixth Circuit noted that *Ake* was one of a number of cases which stand [**35] for the proposition that "indigent prisoners are constitutionally entitled to the basic tools of an adequate defense or appeal, when those tools are

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41, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984)), the Court does not discuss the state law cited by the Petitioner.

available for a price to other prisoners." *Id.* at 615 (internal quotation [**782] marks and citation omitted).[10]

In *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985), a case decided about four months after *Ake*, the Supreme Court revisited the issue of when due process requires that the state pay for expert assistance to an indigent defendant.[11] Therein, the Supreme Court wrote:

> Petitioner also raises a challenge to his conviction, arguing that there was constitutional infirmity in the trial court's refusal to appoint various experts [**36] and investigators to assist him. Mississippi law provides a mechanism for state appointment of expert assistance, and in this case the State did provide expert psychiatric assistance to *Caldwell* at state expense. But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than "the general statement that the requested expert 'would be of great [necessity].'" 443 So.2d

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[10] In Mason, a death penalty habeas case, the Sixth Circuit held that the Ohio Supreme Court had not unreasonably applied *Ake* when it denied the petitioner a soil and debris expert, a shoe-print expert, a mitigation investigator and an independent mental health expert.

[11] Both *Ake* and *Caldwell* were written by Justice Marshall.

> 806, 812 (1983). Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 82-83, 84 L. Ed. 2d 53, 105 S. Ct. 1087(1985) (discussing showing that would entitle defendant to psychiatric assistance as matter of federal constitutional law). We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled [**37] a defendant to assistance of the type here sought.

Id. at 323-24 n. 1.

Herein, the Petitioner requested the assistance of an investigator with a pretrial motion, which indicated, in its entirety:

> Now comes the Defendant, George T. Franklin, by and through his undersigned counsel, and hereby states that he is indigent and does so move the Court to appoint investigative services, experts and any other services as are reasonably necessary to assist in the proper representation of the Defendant in the above captioned cause. Furthermore, Defendant moves the Court that payment of fees and expenses for said services be paid at public expense.

Trial Court Docket No. 6. Judge Winkler overruled that motion, and the Petitioner renewed his request during a pretrial proceeding conducted on November 17, 1988. At that time, Petitioner's counsel argued:

> The final motion I want to bring to the court's attention that's been previously [**38] overruled is the motion for investigative services. Quite

> frankly, this county doesn't have the investigative services that the Public Defender's Office probably should have. It's our position we have done the best we can do with the limited resources available to Mr. Schmidt [Petitioner's co-counsel] and myself to conduct an investigation and contact witnesses and check things out, if you will, but I think in a capital case that there's no question when you have a defendant who's indigent, who [*783] has appointed counsel, that investigative services can be extremely beneficial in tracking down people we can't find who could be very essential witnesses to the defense.
>
> In comparison, we have the State of Ohio, represented by the prosecution, and I don't remember exactly how many law enforcement officials there are in this county anymore, somewhere around a thousand Cincinnati police officers who can or could be available to the state through the auspices of whatever officer they want to ask. That puts the defense, obviously, at a distinct disadvantage. So we're asking the court to reconsider the granting of the motion for investigative services so we can, even at this date, get proper [**39] assistance to help us prepare the case.

Transcript of November 17, 1988 Proceeding at 12-13.

As can be seen, Petitioner's counsel merely indicated during the November 17th proceeding that an investigator could be beneficial in tracking down witnesses who might be essential. Simply stated, the oral and written statements of Petitioner's counsel are "little more than undeveloped assertions that the requested assistance would be beneficial" (*Caldwell*), rather than constituting the preliminary showing

required by *Ake*. In any criminal prosecution, defense counsel might state that an investigator could be helpful, as did Petitioner's trial counsel. If that constituted the preliminary showing required in *Ake*, then the Due Process Clause would require the appointment of an investigator to assist every indigent defendant charged with a crime. In *Moore v. Kemp*, 809 F.2d 702 (11th Cir.) (En banc), *cert. denied*, 481 U.S. 1054, 95 L. Ed. 2d 847, 107 S. Ct. 2192 (1987), the Eleventh Circuit rejected such a proposition, writing:

> *Ake* and *Caldwell*, taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance [**40] from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

Id. at 712. In *Thacker v. Rees*, 841 F.2d 1127, 1988 WL 19179 (6th Cir. 1988), the Sixth Circuit followed the analytical framework set forth in Moore. *Accord, Frazier v. Mitchell*, 188 F. Supp. 2d 798, 849 (N.D.Ohio 2001).

Since the Petitioner failed to make a preliminary showing that he needed the assistance of an investigator, this Court cannot conclude that he suffered a deprivation of due process, as a result of being denied the appointment of such assistance at public expense. Accordingly, the Court overrules Petitioner's Objections (Docs. # 108 and # 114) to the Report and Recommendations (Doc. # 105) and Amended Supplemental Report and Recommendations (Doc. # 112), as they relate to the Third Claim. Moreover, since no

[**41] "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," the Court declines to grant a certificate of appealability on this claim.

C. Fifth Claim

With his Fifth Claim, the Petitioner alleges that his convictions and sentences are void because he was denied his right to a representative jury under the Sixth and Fourteenth Amendments. In particular, he contends that the prosecution violated [*784] *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), by using two of its peremptory challenges to exclude prospective jurors who are African-Americans. Judge Merz recommended that the Court deny this claim, because the Petitioner had not exhausted same, due to his failure to raise it in his direct appeals, and could not demonstrate cause and prejudice for that default. The Petitioner had argued that the ineffective assistance of his appellate counsel, in failing to raise the *Batson* claim during his direct appeals, established cause and prejudice. Judge Merz disagreed, concluding that Franklin had failed to meet the prejudice prong of a claim of ineffective assistance since the prosecution had not violated equal [**42] protection by exercising those two challenges. *See* Doc. # 105 at 63-76. For reasons which follow, this Court agrees. The Court begins by setting forth the standard it must apply to resolve this claim, following which it examines the facts and circumstances giving rise to it.

In *Batson*, the Supreme Court held that the prosecution violates the Equal Protection Clause of the Fourteenth Amendment, by challenging prospective jurors solely on the basis of their race. In *United States v. Copeland*, 321 F.3d 582, 2003 WL 431897 (6th Cir. 2003), the Sixth Circuit reviewed the standards which are applicable to a *Batson* challenge:

> In *Batson*, the Supreme Court held that a prosecutor is precluded from exercising a peremptory challenge on the basis of race. Under *Batson*, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination, the burden shifts to the government to demonstrate a race-neutral reason for the exclusion of the juror. The government is not required to persuade the court that its reasons for dismissing the juror were well-founded; rather, it need only demonstrate that its reasons were race-neutral. *United States v. Humphrey*, 287 F.3d 422, 438 (6th Cir. 2002). [**43] Once the government offers a race-neutral justification, "the challenging party must demonstrate that the purported explanation is merely a pretext for a racial motivation." *McCurdy v. Montgomery County*, 240 F.3d 512, 521 (6th Cir. 2001). The burden of persuasion always rests with the opponent of the strike. *Id.*

321 F.3d 582, 599, [WL] at *10. Herein, since the prosecution was required to identify the race-neutral reasons for challenging the two prospective jurors and the trial court ruled on the ultimate question of whether there was intentional discrimination, the preliminary issue of whether the Petitioner made a prima facie showing of discrimination becomes moot. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991); *Lancaster v. Adams*,324 F.3d 423, 2003 WL 1524231 (6th Cir. 2003). Moreover, it bears emphasis that this Court is ruling upon a request for a writ of habeas corpus, predicated in part on the allegation that the prosecution violated *Batson* by peremptorily challenging two prospective jurors who are African-Americans. In *Purkett v. Elem*, 514 U.S. 765, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995), a habeas [**44] action

raising a *Batson* challenge, the Supreme Court noted that the state court's factual finding of no discrimination is presumed to be correct. *Id.* at 769. *Accord, Johnson v. Gibson*, 169 F.3d 1239, 1248 (10th Cir.), *cert. denied*, 528 U.S. 972, 145 L. Ed. 2d 324, 120 S. Ct. 415 (1999); *Kelly v. Withrow*, 25 F.3d 363, 367 (6th Cir.), *cert. denied*, 513 U.S. 1061, 130 L. Ed. 2d 607, 115 S. Ct. 674 (1994).

During Petitioner's trial, at the conclusion of the voir dire, the parties exercised their peremptory challenges. The prosecution exercised two of its challenges to exclude prospective African-American jurors, Mr. Colston ("Colston") [*785] and Mrs. Fowler ("Fowler").[12] Franklin's trial counsel objected, and requested that Judge Winkler require the prosecution put its reasons for exercising those challenges on the record. Judge Winkler acceded to that request. The prosecutor explained that, during the first day of voir dire, Colston had indicated that serving on a jury could cause him a problem with his employment, that he had heard something about the case in the media which could cause him a problem and that he knew some police officers. Trial Transcript [**45] at 658. However, those problems

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[12] The prosecution did not exercise a preemptive challenge to exclude a third African-American juror. Of course, the presence of an African-American on the jury does not preclude a finding that the prosecution excluded other jurors because of their race. *United States v. Harris*, 192 F.3d 580, 587 (6th Cir. 1999). Therein, the Sixth Circuit indicated that the fact that one African-American was seated on the jury, standing alone, did not warrant the finding that the defendant had failed to prove that the prosecution had intentionally discriminated against other jurors on the basis of their race. *Id.* The *Harris* court did not, however, suggest that the fact that the prosecution allowed one African-American to remain on the jury was irrelevant to that question.

seemingly disappeared on the second day, when Colston appeared to the prosecutor to be unusually anxious to be selected as a juror. *Id.* Simply stated, Colston was challenged because he seemed to be unusually anxious to serve as a juror. *Id.* The prosecutor explained that Fowler had been challenged because she immediately indicated that she felt sorry for the defendant, when she learned that she might be sitting on a death penalty case. *Id.* at 661. The prosecutor also explained that Fowler had been challenged, because she had worked as a cook for a number of years in a synagogue. *Id.* Although the prosecutor did not know how she had been treated in that employment, he assumed that she had been treated badly at times. *Id.* Since the victim was Jewish, the prosecutor decided to challenge Fowler. *Id.* Based upon the prosecution's explanations, Judge Winkler excused each of the challenged jurors, thus indicating that the prosecution had not engaged in intentional discrimination by exercising those peremptory challenges.

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With respect to Colston, the Petitioner argues that other jurors who expressed similar problems were not the subject of peremptory challenges exercised by the prosecution. Juror Bostic admitted that he had an employment conflict, that he knew police officers and that he had been exposed to media coverage of the case. Juror Sikorski admitted to the possibility of employment problems and to exposure of media coverage. Juror Bergh stated that he had been exposed to the case at Proctor & Gamble, where he and Strauss had worked in different divisions of the advertising department, and that his brother-in-law was a police officer. As the Petitioner argues, the prosecution did not challenge those prospective jurors, who were not African-Americans. The flaw in the Petitioner's argument is that it is based upon a misperception of the nature of the prosecutor's explanation for challenging Colston. The prosecutor did not challenge

Colston because serving on the jury could cause him an employment problem, he knew police officers and had been exposed to the case through pretrial publicity. Rather, the prosecutor excused Colston because he indicated during the first day of voir dire that the foregoing [**47] might cause him problems with jury service, while those problems seemingly disappeared the second day, which caused the prosecution to believe that he had an unusual desire to be on the jury. The Petitioner has not pointed to a single white juror who underwent a transformation similar to Colston's, yet was not peremptorily [*786] challenged by the prosecution. As a consequence, the Court concludes that the Petitioner has failed to overcome the presumption of correctness with respect to Judge Winkler's decision to permit the prosecutor to exercise a peremptory challenge and excuse Colston.

With respect to Fowler, the Petitioner has failed to identify a white, prospective juror who was not peremptorily challenged by the prosecution after indicating that he or she felt sorry for the defendant because the death penalty was being sought. Nevertheless, the Petitioner points out that Fowler also indicated that she felt sorry for the victim. However, the Petitioner has not pointed to a white, prospective juror who was not challenged by the prosecution, after indicating that he or she felt sorry for both the Petitioner and the victim. Thus, the prosecution's initial reason for challenging Fowler [**48] was race-neutral. It bears emphasis that, in *Batson*, the Supreme Court said that a prosecutor's explanation for exercising a particular peremptory challenge need not rise to the level justifying the exercise of a challenge for cause. 476 U.S. at 97. *See also*, *United States v. Tucker*, 90 F.3d 1135, 1142-43 (6th Cir. 1996). Therefore, the fact that Fowler may have been impartial, due to her feeling sorry for both the Petitioner and the victim, is not dispositive of the *Batson* question. The other stated reason for challenging Fowler, that she may have

been treated badly during her employment in synagogues, thus causing her to be unsympathetic to Strauss, the Jewish victim, is in part a product of the prosecutor's imagination, since he conceded that he did not know how she had been treated in her employment. Nevertheless, that reason is race-neutral, given that the Petitioner has not identified a similarly situated white, prospective juror who was not peremptorily challenged by the prosecutor. Accordingly, the Court concludes that the Petitioner has failed to overcome the presumption of correctness with respect to Judge Winkler's decision to permit [**49] the prosecutor to exercise a peremptory challenge and excuse Fowler.

Accordingly, the Court overrules Petitioner's Objections (Docs. # 108 and # 114) to the Report and Recommendations (Doc. # 105) and Amended Supplemental Report and Recommendations (Doc. # 112), as they relate to the Fifth Claim. However, since "reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong," the Court grants a certificate of appealability on this claim.

D. Eighth and Thirteenth Claims

With these two claims, the Petitioner contends that the prosecution violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963), and its progeny, by withholding favorable evidence from him. Judge Merz recommended that this Court reject the Respondent's assertion that these claims are procedurally defaulted and deny them on the merits.[13] As a means of analysis, this Court will briefly review the jurisprudence pertaining to *Brady* and

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[13] The Respondent has not objected to the Magistrate Judge's recommendation that the Court decline to find these claims procedurally defaulted.

its progeny, following which it will turn to the parties' arguments concerning this issue.

[**50]

As the Sixth Circuit has noted, *Brady* did not create a general constitutional right to discovery in criminal cases; rather, the rule established therein "is concerned only with cases in which the government possesses information which the defendant does not, and the government's [*787] failure to disclose the information deprives the defendant of a fair trial." *United States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994). *Brady* imposes upon the government "an obligation 'to turn over evidence in its possession that is both favorable to the accused and material to guilt ... '" *United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 57, 94 L. Ed. 2d 40, 107 S. Ct. 989 (1987)) (emphasis supplied by the Sixth Circuit). In *Schledwitz v. United States*, 169 F.3d 1003 (6th Cir. 1998), the Sixth Circuit elaborated upon the materiality requirement of Brady:

> When the defendant, as in this case, asserts that the newly discovered *Brady* evidence is exculpatory, the defendant will be entitled to a new trial if he shows that the favorable evidence at issue was "material." *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997). [**51] In *Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), the Supreme Court clarified the "materiality" analysis. The Court explained that a showing of materiality does not require the suppressed evidence in question establish the defendant's innocence by a preponderance of the evidence. Rather, the "question is not whether the defendant would more likely than not have received a different

> verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434; *Frost*, 125 F.3d at 382-83. Nor does the defendant need to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35; *United States v. Smith*, 316 U.S. App. D.C. 199, 77 F.3d 511, 515 (D.C.Cir. 1996) (materiality requirement is not a sufficiency-of-the-evidence test).
>
> Instead, any favorable evidence, regardless of whether the defendant has made a request for such evidence, is "material" if "there is a reasonable probability that, had the [**52] evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34 (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)); *Frost*, 125 F.3d at 382. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988). Moreover, in determining whether undisclosed evidence is material, the suppressed evidence is considered collectively, rather than item-by-item, to determine if the "reasonable probability" test is met. *Kyles*, 514 U.S. at 436; Frost, 125 F.3d at 383.

Id. at 1011-12. In addition, "*Brady* recognizes no distinction between evidence which serves to impeach a government witness' credibility and evidence which is directly exculpatory of the defendant. Both are 'evidence favorable to

the accused' and must be disclosed." *Mullins*, 22 F.3d at 1372. *See also Giglio v. United States*, 405 U.S. 150, 154, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972) [**53] ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [*Brady*]"). The Sixth Circuit has said that "no *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information.'" *United States v. Clark*, 928 F.2d 733, 738 (6th Cir.) (quoting *United States v. Grossman*, 843 F.2d 78, 85 (2nd Cir. 1988), *cert. denied*, 488 U.S. 1040, 102 [*788] L. Ed. 2d 988, 109 S. Ct. 864 (1989)), *cert. denied*, 502 U.S. 846, 116 L. Ed. 2d 110, 112 S. Ct. 144 (1991). *See also, Mullins*, 22 F.3d at 1371-72 ("*Brady* is concerned only with cases in which the government possesses information which the defendant does not, and the government's failure to disclose the information deprives the defendant of a fair trial"); *United States v. Todd*, 920 F.2d 399, 405 (6th Cir. 1990). Moreover, the Sixth Circuit has indicated that there is no violation of *Brady*, unless the undisclosed materials would have led directly to the discovery of admissible evidence. *Phillip*, 948 F.2d at 249-50. [**54]

The Petitioner argues that the prosecution violated *Brady* and its progeny, by failing to disclose exculpatory information and information which he could have used to impeach prosecution witnesses. In his Objections, the Petitioner asserts that the prosecution violated *Brady* by withholding evidence that someone other than himself was spotted near the scene of the murder around the time it occurred, evidence which could have been used to impeach important witnesses and by withholding evidence that a jailhouse informant was offered a deal in exchange for his testimony. Doc. # 108 at 22; Doc. # 114 at 22. The Petitioner contends that the cumulative effect of this evidence

undermines confidence in the verdict and, therefore, warrants habeas relief. *Id.* As a means of analysis, the Court will address these contentions in the above order.

During their investigation of the murder of Strauss, police officers interviewed Jay Lazarus ("Lazarus"), a student at Cincinnati Technical College who lived near Strauss' residence. Lazarus stated that he had walked to a local grocery store at about midnight on Sunday, August 7, 1988, although he was not positive about the time.[14] On the [**55] way back to his apartment, Lazarus had seen an African-American male on the east side of Strauss' condominium.[15] Lazarus described that individual as being about thirty years of age and 5'6", as well as having a stocky build and curly middle length hair. Lazarus also reported that he believed that he was awakened by a noise later that night and looked out and saw a different African-American male in a wooded area behind Strauss' residence, where some property which had been stolen therefrom was subsequently found.

Petitioner argues that the prosecution violated *Brady* by failing to disclose the information Lazarus had provided to police, because that information could have been used to convince the jury [**56] that someone else had murdered Strauss. Judge Merz recommended that the Court reject this aspect of Petitioner's *Brady* claim, because the information provided by Lazarus was not material. Doc. # 105 at 105-06.

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[14] Strauss was last seen by a neighbor around 11:00 p.m., on Saturday, August 6, 1988; therefore, Lazarus may have seen the individual on the east side of Strauss' condominium around the time of the murder.

[15] One could enter Strauss' condominium from the east side where the patio was located.

Judge Merz pointed out that there is nothing in the record which indicates that the description of the first person seen by Lazarus was incompatible with Franklin in August, 1988. Although Franklin was only twenty-two years of age during that month and Lazarus indicated that the first person he saw appeared to be thirty, there is no evidence in the record that the Petitioner did not appear to be a thirty year old person in August, 1988. In other words, Petitioner's premise that the first person Lazarus saw was someone other than himself is not borne out by the record. Lazarus was not certain of the date upon which [*789] he saw the other individual, although he thought he saw that individual on August 8th, as well. Since it is not known whether the first person seen by Lazarus matched the Petitioner's description and on what date he saw the second person, the Court agrees with Judge Merz that "there is [no] reasonable probability that, had the evidence [provided by Lazarus] [**57] been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34. Accordingly, that information is not material and the failure to disclose it did not violate *Brady*.

During the trial, Michael Turnbolt ("Turnbolt") testified on behalf of the prosecution that he spent the evening, upon which Strauss was murdered, doing drugs with the Petitioner, who left around 10:30 p.m. Turnbolt next saw the Petitioner the following morning around 2:30. At that time, the Petitioner had changed his shirt and had a number of $ 20 bills, which he had not possessed earlier that evening.[16]Turnbolt did not inform police officers of the

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[16] Turnbolt's testimony that Franklin possessed a number of $ 20 bills implicated the Petitioner in the murder of Strauss, because other evidence introduced at trial established that a money clip and currency belonging to Strauss had been stolen during the burglary of his condominium.

matters about which he testified until shortly before the Petitioner's trial commenced. The Petitioner contends that the prosecution violated *Brady* by failing to disclose information which could have been used to impeach Turnbolt. In particular, Franklin points out that officers were told by Ron Jones ("Jones") that Steve Boseman ("Boseman") had indicated that he was an acquaintance of Franklin and that property stolen from Strauss' residence was located in an apartment on Woodburn Avenue. Turnbolt [**58] lived in an apartment located at 2712 Woodburn Avenue. Petitioner contends that the information that someone had indicated that property stolen from Strauss was located in an apartment on Woodburn Avenue could have been used to impeach Turnbolt, since it might have shown that Turnbolt had a motive to provide false testimony against the Petitioner. Although the Petitioner does not identify Turnbolt's motive to testify falsely, the Court assumes that it would be to implicate the Petitioner and, thus, to direct the officers' attention away from his (Turnbolt's) connection with the theft of Strauss' possessions and, perhaps, his murder.

Judge Merz concluded that the information Jones had supplied to police officers was not material. [**59] *See* Doc. # 105 at 104-05. This Court agrees with that conclusion and adopts same. The information police had received from Jones was hearsay, and did not mention Turnbolt. Moreover, Petitioner has not supplied any admissible evidence, tending to establish that property stolen from Strauss' apartment was stored at Turnbolt's apartment on Woodburn. Thus, it bears emphasis that the prosecution failed to disclose speculation supported only by hearsay. The Petitioner has failed to suggest how that speculation could have been used at trial. *See* Phillip, supra (indicating that there is no violation of

Brady, unless the undisclosed materials would have led directly to the discovery of admissible evidence). Petitioner could have asked Turnbolt if property stolen from Strauss was located in his apartment on Woodburn. However, it should be noted that the Petitioner's theory is that Turnbolt testified falsely during the trial and that the information supplied by Jones could be used to impeach him. Accepting for present purposes that Turnbolt testified falsely in order to direct police [*790] attention away from his participation in the burglary of Strauss' residence, there is [**60] no reason to believe that Turnbolt would have experienced an epiphany and decided to tell the truth merely because Petitioner's counsel asked him on cross-examination whether property taken from Strauss' residence was located in his apartment on Woodburn. Thus, the Court cannot conclude that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34.

During Petitioner's trial, Larry Weaver ("Weaver"), who was incarcerated with Franklin prior to his trial, testified on behalf of the prosecution. Petitioner contends that the prosecution violated Brady, because it failed to disclose that Weaver had been offered consideration in exchange for his testimony. At trial, Weaver testified that the prosecution had not offered him anything in exchange for his testimony. Judge Merz recommended that the Court reject the Petitioner's claim based upon Weaver, because there was no evidence that Weaver had lied during his testimony or that the prosecution had offered him anything in exchange for it.[17] Doc. # 105 at 116-17. This Court agrees with the

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[17] The Petitioner had supported this claim with an affidavit from Warren Coaston, who was also incarcerated with Franklin. Coaston indicated that he had testified falsely before the Grand Jury that Franklin had confessed, in

reasoning of the [**61] Magistrate Judge in that regard and adopts same. Accordingly, it rejects the Petitioner's argument that the prosecution violated *Brady* by failing to disclose promises made to Weaver in exchange for his testimony.

Considering the foregoing information withheld by the prosecution both individually and collectively, the Court concludes that "there is [no] reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have [**62] been different." *Kyles*, 514 U.S. at 433-34. Therefore, the information which the prosecution withheld was not material. Consequently, the prosecution did not violate its obligations under Brady. Accordingly, the Court overrules Petitioner's Objections (Docs. # 108 and # 114) to the Report and Recommendations (Doc. # 105) and Amended Supplemental Report and Recommendations (Doc. # 112), as they relate to the Eighth and Thirteenth Claims. However, since "reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong," the Court grants a certificate of appealability on these claims.

E. Twentieth Claim

With this claim, the Petitioner alleges that his convictions and sentences are void, because the trial court improperly instructed the jury during the guilt phase of the trial, in violation of the Due Process Clause of the Fourteenth

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exchange for help from the prosecutor concerning the charges pending against him (Coaston). Coaston did not testify during Petitioner's trial. The Petitioner also provided an affidavit from Robert Penebaker, who indicated that he had been threatened by prosecutors because he had refused to testify against Franklin.

Amendment.[18] The Petitioner initially set forth four alleged errors in jury instructions. In [*791] his Objections, however, he challenges only the manner in which Judge Winkler instructed the jury on the meaning of "purpose." *See* Doc. # 108 at 31-32; Doc. # 114 at 32-33. Based upon [**63] its own independent review of the record, this Court concurs with Judge Merz's recommendation that the Petitioner be denied relief on the other three grounds of the Twentieth Claim. Accordingly, the Court adopts the Report and Recommendations (Doc. # 105), as that judicial filing relates to the assertions in Petitioner's Twentieth Claim that the trial court improperly defined "foreseeability," and "reasonable doubt," and that its preliminary instruction on the capital specification was improper. In addition, since the Petitioner has not shown that reasonable jurists would find this Court's assessment of those issues claims debatable or wrong, the Court will not award a certificate of appealability for any one or more or all of them. The Court now turns to the Petitioner's one objection on this claim, that Judge Winkler unconstitutionally defined "purpose."

[**64]

Judge Merz recommended that the Court reject the Respondent's assertion that the Petitioner had procedurally defaulted this claim and that the Court deny relief to the Petitioner on the merits. The Respondent has failed to object

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[18] In support of this claim, the Petitioner also cites the Fifth, Sixth and Eighth Amendments. However, since this claim is based upon *Sandstrom v. Montana*, 442 U.S. 510, 512, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979), which held that jury instructions which create conclusive presumptions of an element of an offense violate the Due Process Clause of the Fourteenth Amendment, the Court need not address the other constitutional provisions further.

to the recommendation of the Magistrate Judge that this claim is not procedurally defaulted. For reasons which follow, the Court concurs with the recommendation of Judge Merz on the merits of this claim.

Under *Ohio Revised Code §* 2903.01(B), the prosecution was obligated to prove, beyond a reasonable doubt, that the Petitioner acted with the purpose to kill. Petitioner contends that Judge Winkler's instructions created a conclusive presumption on that mens rea element. Judge Winkler instructed the jury that to find the Defendant guilty, the jury would be required to find that Franklin "purposely caused the death of Gerald R. Strauss." Trial Transcript at 1261. Judge Winkler then defined "purpose:"

> Purpose to cause death is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question [**65] there was present in the mind of the defendant a specific intention to kill Gerald R. Strauss while the defendant was committing aggravated burglary.
>
> A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, if it is his specific intention to engage in conduct of that nature.
>
> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in specific conduct. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

> Now the purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.
>
> So, the purpose with which a person does an act or brings about a result is determined from the manner in which it was done, the means or weapon used and all of the other facts and circumstances in evidence.
>
> However, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life or inflict great bodily harm, the purpose to kill may be inferred from the use of the weapon.
>
> Proof of [**66] motive is not required. The presence or absence of motive is one of [*792] the circumstances bearing upon purpose. Where an act is a crime, a good motive or purpose is not a defense.

Id. at 1261-63. The Petitioner argues that the foregoing instruction told the jury that "purpose is determined: from the use of a weapon." Doc. # 108 at 31; Doc. # 114 at 32 (emphasis in the original).[19] Since this Court does not interpret the language employed by Judge Winkler in the same manner as does the Petitioner, he is not entitled to relief on this claim. Rather, the only fair interpretation of Judge Winkler's jury instruction is that purpose may be inferred from the use of the weapon, rather than being determined

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[19] The Petitioner also argues that the second paragraph from the instructions on purpose, quoted above, was unnecessary under state law. Since this Court is without authority to grant a writ of habeas corpus for violations of state law (*Pulley v. Harris*, 465 U.S. 37, 41, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984)), it declines to address that argument.

from same. Moreover, as is discussed below, this claim lacks legal support.

[**67]

According to Franklin, such an instruction created a conclusive presumption on the question of whether he acted with the purpose to kill Gerald Strauss. In support of this assertion, he relies upon *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39, 99 S. Ct. 2450 (1979). Therein, *Sandstrom* was convicted of deliberate homicide, which was defined by Montana law as purposely or knowingly taking the life of another. Over *Sandstrom's* objection, the trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." After the Montana Supreme Court had affirmed the conviction, *Sandstrom* appealed to the United States Supreme Court, arguing that the quoted instruction had denied him the right to due process of law, because it created a conclusive presumption on the mens rea element. In *Sandstrom*, the United States Supreme Court agreed that the jury instruction had violated due process by creating a conclusive presumption. In accordance with *Roberts v. Marshall*, 736 F.2d 1126 (6th Cir. 1984), cert. denied, 469 U.S. 1193, 83 L. Ed. 2d 974, 105 S. Ct. 970 (1985), this Court concludes that *Sandstrom* is [**68] distinguishable. In Roberts, the petitioner, after having been convicted of murder in violation of Ohio law, sought a writ of habeas corpus, arguing, inter alia, that the manner in which the trial court had defined "purpose" violated *Sandstrom*. The instruction given in Roberts was virtually identical to that utilized by Judge Winkler, except that the Roberts instruction also told the jury that "[a] person is presumed to have a purpose or design behind his voluntary acts, unless his actions are otherwise explained by the evidence." 736 F.2d at 1127. The Sixth Circuit held that this instruction was distinguishable from that given in *Sandstrom*, since the jury was not

informed that it must apply a presumption or that the petitioner had a burden of proof. *Id.* at 1128.

Since *Sandstrom* is distinguishable in accordance with Roberts, this Court cannot conclude that Petitioner suffered a deprivation of due process, as a result of the manner in which "purpose" was defined in the instructions given to the jury during his trial. Accordingly, the Court overrules Petitioner's Objections (Docs. # 108 and # 114) to the Report and Recommendations [**69] (Doc. # 105) and Amended Supplemental Report and Recommendations (Doc. # 112), as they relate to the Twentieth Claim. Moreover, since no "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," the Court declines to [*793] grant a certificate of appealability on this claim.

III. Respondent's Objections (Doc. # 106)

Judge Merz recommended that the Court grant the Petitioner a writ of habeas corpus on his Sixth Claim, with which he alleged that his convictions and sentences were void, because service on the jury by a biased juror deprived him of the right to a fair and impartial jury, as guaranteed by the Due Process Clause of the Fourteenth Amendment. The Petitioner failed to present this claim during his direct appeals in state court. Nevertheless, Judge Merz recommended that this Court find that the Petitioner had shown cause and prejudice to excuse this procedural default, as a result of the ineffective assistance rendered by his appellate counsel in failing to raise the issue during Franklin's direct appeals. Judge Merz also recommended that the Court conclude that the Petitioner is entitled to the requested relief on this [**70] claim, because his convictions and sentences were unconstitutional due to the presence of a biased juror. The Respondent has objected to the Magistrate Judge's recommendations, arguing both that the Petitioner's

Sixth Claim is barred by procedural default and that he is not entitled to relief on the merits of this claim, even if it has not been defaulted.

The Magistrate Judge wrote twenty pages on this claim in his Report and Recommendations (*See* Doc. # 105 at 76-96) and an additional five pages on it in his Amended Supplemental Report and Recommendations (*See* Doc. # 112 at 2-6). He also wrote twenty-five pages, resolving the question of whether Franklin's appellate counsel failed to provide effective assistance of counsel, including a discussion of the question of whether appellate counsel were ineffective in failing to raise the biased juror issue during Petitioner's direct appeals. *See* Doc. # 105 at 174-99. The discussion of the Petitioner's Sixth Claim and the ineffective assistance of appellate counsel, set forth in the Magistrate Judge's Report and Recommendations and Amended Supplemental Report and Recommendations, is thorough, comprehensive, well written and adequately [**71] addresses the arguments raised by the Respondent in his Objections (Doc. # 106). Therefore, although this Court has conducted a de novo review of those arguments and the record before it, there is no need to "reinvent the wheel" through a written discussion of the Petitioner's Sixth Claim and the parties' arguments in support of and in opposition to same. Rather, based upon the reasoning, citations of authority and reference to the record in this matter set forth by Judge Merz in his Report and Recommendations (Doc. # 105) and in his Amended Supplemental Report and Recommendations (Doc. # 112), the Court overrules the Respondent's Objections (Doc. # 106). The Magistrate Judge's judicial filings are adopted as they relate to the Sixth Claim and to the aspect of the First Claim which is predicated on the presence of a biased juror. The Court will, however, briefly comment on one of the Petitioner's arguments.

The Respondent argues that the Magistrate Judge was incorrect in his recommendation that the procedural default of the Sixth Claim is excused by cause and prejudice, because raising a claim of ineffective assistance of appellate counsel is not the same as raising the underlying [**72] biased juror claim. *See* Doc. # 106 at 6-7. Although the Court agrees with Respondent that raising a claim of ineffective assistance of counsel is not the same as raising the underlying claim, it cannot agree that this is the basis for concluding [*794] that procedural default of the Petitioner's Sixth Claim is not excused. In *Edwards v. Carpenter*, 529 U.S. 446, 146 L. Ed. 2d 518, 120 S. Ct. 1587 (2000), the Supreme Court reiterated that a claim of ineffective assistance of counsel can serve as cause and prejudice, excusing a procedural default on the underlying claim (i.e., the sequela of the ineffective assistance), as long as the ineffective assistance claim itself has not been procedurally defaulted. Based upon the reasoning and citations of authority set forth by Judge Merz in his Report and Recommendations, this Court concludes that the Petitioner did not procedurally default his ineffective assistance of appellate counsel claim. Moreover, since the Court agrees with the Magistrate Judge that Franklin's appellate counsel rendered ineffective assistance by failing to raise the juror bias issue during his direct appeals, it concludes that Petitioner has demonstrated cause and prejudice, [**73] excusing the failure to raise the issue during his direct appeals. Additionally, the decisions relied upon by the Respondent, *Lott v. Coyle*, 261 F.3d 594, 612 (6th Cir. 2001) and *Buell v. Mitchell*, 274 F.3d 337, 361 (6th Cir. 2001), do not cause this Court to conclude that the Petitioner failed to establish cause and prejudice. Thus, the merits of his Sixth Claim may be addressed and resolved.

Based upon the foregoing, the Court overrules the Respondent's Objections (Doc. # 106) to the Report and Recommendations (Doc. # 105) of the Magistrate Judge.

In sum, the Court concludes that, based upon his Sixth Claim and the aspect of his First Claim predicated upon failure of appellate counsel to raise the biased juror issue during his direct appeals, the Petitioner is entitled to a conditional writ of habeas corpus, which will result in his release from custody if he is not retried within 180 days. The Court adopts the Report and Recommendations (Doc. # 105) and Amended Supplemental Report and Recommendations (Doc. # 112) of the Magistrate Judge, as supplemented herein.

The Court directs that judgment be entered in favor of the Petitioner and against [**74] the Respondent on the Sixth Claim and the aspect of his First Claim predicated upon failure of appellate counsel to raise the biased juror issue during his direct appeals, and in favor of the Respondent and against the Petitioner on all other claims.

It is anticipated that Petitioner will seek leave to appeal in forma pauperis. Such a motion will be granted. The Petitioner is granted a certificate of appealability on his Second, Fifth, Eighth and Thirteenth Claims.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

March 31, 2003

WALTER HERBERT RICE,

CHIEF JUDGE

UNITED STATES DISTRICT COURT

JUDGMENT IN A CIVIL CASE

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that judgment is entered in favor of the Petitioner and against the Respondent on the sixth claim and a portion of the first claim and in favor of the Respondent and against the Petitioner on the remaining claims.

Date: March 31, 2003

APPENDIX D

GEORGE T. FRANKLIN,

Petitioner,

v.

CARL S. ANDERSON, Warden,

Respondent.

Case No. C-1-95-1007
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
2002 U.S. Dist. LEXIS 26814
August 21, 2002, Decided

Petitioner George T. Franklin brings this habeas corpus action pursuant to 28 U.S.C. § 2254. [*2] In 1988, Franklin was tried and convicted of one count of aggravated murder with a capital specification in violation of Ohio Rev. Code § 2903.01(B) and 2929.04(A)(7), and two counts of aggravated burglary in violation of Ohio Rev. Code § 2911.11. The trial court adopted the jury's recommendation that Franklin be sentenced to death on the aggravated murder conviction. *State v. Franklin*, No. B-884127 (Court of Common Pleas, Hamilton County filed Jan. 11, 1989). He was also sentenced to two consecutive terms of ten to twenty-five years of imprisonment with ten years' actual incarceration on each of the burglary convictions.

In his Petition for Writ of Habeas Corpus and its amendment, Franklin pleads the following twenty-eight grounds for relief: [1]

> 1. The Due Process Clause of the Fourteenth Amendment guarantees a habeas corpus petitioner effective assistance of appellate counsel. Prejudicially deficient performance by appellate counsel during Petitioner's direct appeals violates Petitioner's rights to effective assistance of counsel as guaranteed by the Eighth and Fourteenth Amendments.
>
> 2. Petitioner Franklin's [*3] convictions and sentence are void or voidable because he was denied the effective assistance of trial counsel in violation of his Sixth Amendment rights to counsel and his rights to due process guaranteed by the Fourteenth Amendment to the United States Constitution.
>
> 3. Petitioner Franklin's conviction and sentence are void and/or voidable because the trial court failed to appoint an investigator in Mr. Franklin's capital case. The trial court denied Petitioner Franklin his right[s] due process, equal protection, effective assistance of counsel, statutory rights and rights under the Ohio Supreme Court's Rules of Superintendence for Courts of Common Pleas,

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[1] Here, and in the account of the issues raised in the state court proceedings that follows, the Court has, for ease of reading, converted issues presented in all capital letters to lower case with appropriate capitalization. All other corrections or changes to the text of the issues are indicated within each claim or ground for relief, assignment of error, or proposition of law.

under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when it failed to provide him with expert assistance as those services were reasonably necessary to insure adequate trial representation.

4. Petitioner Franklin's death sentence is unreliable and inappropriate because he was denied the procedural safeguard of a meaningful, independent review of the jury's death recommendation by the trial court in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States [*4] Constitution.

5. Petitioner Franklin's convictions and sentences are void or voidable because the trial court denied him his right to a representative jury and equal protection under the Sixth and Fourteenth Amendments to the United States Constitution.

6. Petitioner Franklin's convictions and sentences are void or voidable because the service of a biased juror on the jury in Petitioner's case violated his right[s] to trial by a fair and impartial jury and to due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

7. Petitioner Franklin's convictions and sentences are void or voidable because the trail [sic] court denied Petitioner's motion to sever the charge of aggravated burglary . . . [of] Rosha Winston['s apartment] from the charges of aggravated murder and aggravated burglary . . . [of] Gerald Strauss [and his apartment, respectively]. The trial court denied Petitioner his rights under the Sixth,

Eighth and Fourteenth Amendments to the United States Constitution.

8. Petitioner Franklin's conviction and sentence are void and/or voidable because the State of Ohio failed to provide relevant discovery of [*5] potentially exculpatory evidence and impeachment evidence at the guilt phase of his trial.

9. Petitioner Franklin's conviction and sentence are void and/or voidable because Ohio's reviewing courts failed to fulfill their statutory obligation to meaningfully review the proportionality of Petitioner Franklin's death sentence.

10. Petitioner Franklin's conviction and sentence are void and/or voidable because the policies adopted and procedures employed by the Hamilton County Prosecutor's Office in seeking and securing capital convictions and death sentences violate [the] Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. As a result, Petitioner Franklin's convictions and death sentence are constitutionally infirm.

11. Petitioner Franklin's conviction and sentence are void and/or voidable because the Ohio death penalty scheme, on its face and as applied in this case, violates the United States Constitution.

12. Petitioner Franklin's convictions and sentences are void and/or voidable because he was convicted and sentenced on insufficient State's evidence in violation of his rights under the

Eighth and Fourteenth Amendments to the United [*6] States Constitution . . .

13. Petitioner Franklin's conviction and sentence are void and/or voidable because the State of Ohio failed to disclose impeaching information which undermined the credibility of its witnesses including jailhouse informant Larry Weaver.

14. Petitioner Franklin's convictions and sentences are void or voidable because the trial court violated Petitioner's right against self-incrimination in violation of the Fifth and Fourteenth Amendments.

15. Petitioner Franklin's conviction and sentence are void and/or voidable because the procedures and instructions of the trial court during voir dire skewed this entire capital proceeding in favor of guilt verdicts and of the death penalty in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

16. Petitioner Franklin's convictions and sentences are void or voidable because he was denied the procedural safeguard of a meaningful, independent review of the Jury's death recommendation, and of the trial court's review by the Court of Appeals in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

17. Petitioner Franklin's [*7] conviction and sentence are void and/or voidable because the trial court and the State of Ohio interfered with Petitioner's right to effective assistance of counsel by denying access to and failing to disclose

exculpatory information material to the guilt phase of the proceedings.

18. Petitioner Franklin was denied his right to a fair trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution because the trial court failed to excuse for cause several biased jurors.

19. Petitioner Franklin's convictions and sentences are void or voidable because the trial court denied Petitioner's request for lesser included offense instructions on murder and involuntary manslaughter in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

20. Petitioner's convictions and sentences are void or voidable because the trial court improperly instructed the jury at the trial phase in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

21. Petitioner Franklin's convictions and sentences are void and/or voidable because the trial court failed to keep [*8] a complete record of the proceedings.

22. Petitioner Franklin's convictions and sentences are void or voidable because the admission of prejudicial evidence of prior bad acts at the trial phase violated Petitioner's right to due process and a fair trial [sic] as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

23. Petitioner Franklin's convictions and sentences are void or voidable because the trial court improperly excluded several prospective

jurors under the wrong standard in violation of Petitioner's rights under the Fourteenth Amendment.

24. Petitioner Franklin's convictions and sentences are void or voidable because the State interjected irrelevant and prejudicial evidence about the victim into Petitioner's trial phase in violation of State Rules of Evidence and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

25. Petitioner Franklin's convictions and sentences are void or voidable because the admission of hearsay evidence violated Petitioner's rights of confrontation of witnesses and due process under the Sixth and Fourteenth Amendments to the United States Constitution.

26. [*9] Petitioner Franklin's rights to a fair trial, a reliable death sentence and to due process under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated because prejudicial evidence was introduced at his trial. Petitioner's convictions and sentences are therefore void or voidable.

27. Petitioner Franklin was denied his rights to a fair trial, to due process and to a reliable death sentence by the State's improper arguments and tactics throughout this trial. Accordingly, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated and his convictions and sentences are void or voidable.

28. Petitioner Franklin's death sentence is void or voidable because of erroneous instructions to the

jury at the penalty phase of his capital trial that violated Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

(Docket Nos. 5 and 25.)

[*10]

Some familiarity with the facts in Franklin's case will facilitate an understanding of and provide context for the Court's description of the proceedings in the state courts and the analysis that follows. Thus, the Court will set forth some of the relevant facts in as brief a fashion as practicable and will elaborate upon them as necessary in its discussion of the merits of Franklin's asserted grounds for relief.

On July 21, 1988, Rosha Winston's apartment on Eden Avenue in Cincinnati, Ohio, was burglarized while she was away for a few hours. Winston indicated to police that she had seen her next door neighbor watching her in the past, that she thought he could be the culprit, and that she knew him only by his first name, George. The officers suspected access to the apartment had been gained through a rear window from which the screen had been cut and removed. Winston's television was missing, and a framed photograph that had been on the television had been moved to a table. A thumb print, later determined to be that of Petitioner George Franklin, was lifted from the framed photograph.

Around that same time and in the same general area, Gerald Strauss, the murder victim, and Karen [*11] Strain moved into a condominium on Corry Street. On Sunday, August 7, 1988, Strain left for a business trip in the morning, and Strauss entertained a college friend who was visiting for the weekend. In the evening, Strauss, his guest, and some other friends got together at the condominium for a barbeque. Afterwards, Strauss dropped his guest off at a Cincinnati

hotel, and returned home alone where a neighbor saw him cleaning up the patio and kitchen area of the condominium at about 10:30 p.m. Shortly thereafter, Strauss retired to bed.

The next morning, Strauss did not show up at work. Concerned, a co-worker phoned Strauss' home, repeatedly getting a busy signal. After learning from an operator that there was no conversation on Strauss' phone line, the co-worker went to Strauss' condominium and found the front door ajar. Receiving no response to his calls, the co-worker left to seek help and quickly found a police officer just down the street from the condominium. The police officer entered the condominium and found Strauss' blood-covered body lying on the floor of his bedroom between the wall and bed. At trial, Hamilton County deputy coroner Lee Lehman testified that Strauss died [*12] from many blows to his head and that Strauss' injuries were typical of those inflicted with a hammer.

Cincinnati police contacted Karen Strain to inform her of Strauss' death, and she returned to Cincinnati the next morning. She pointed out to police items that were missing from the condominium, among them Strauss' money clip, and also told them that an empty champagne bottle she and Strauss had saved from a special occasion had been moved from the kitchen window on the first floor to the extra bedroom upstairs. A print lifted from the bottle using a cyanoacrylate or "super glue" fuming process yielded one fingerprint that was subsequently identified as being from Franklin's left middle finger. Although Franklin had moved from the residence next door to Rosha Winston's home soon after the burglary of her apartment, police found where he was living and arrested him for Strauss' murder and the burglaries of Strauss' and Winston's homes on August 18, 1988.

At trial, one of Franklin's acquaintances testified that he had seen a penniless Franklin at about 10:30 or 10:45 p.m. the night of the murder, but that Franklin had gone somewhere and returned at about 2:30 a.m. with approximately [*13] $ 100-150 in ten- and twenty-dollar bills. Strauss' houseguest testified that Strauss had several twenty-dollar bills in his money clip when they were shopping in preparation for the barbeque the night of Strauss' murder. A neighbor of Strauss' testified that she heard a horrible scream come from the direction of Strauss' condominium when she was out walking her dog at about 11:00 or 11:30 p.m. that night, and that when she arrived home, her dog began barking frantically as if a stranger were passing by the apartment. Evidence was also produced showing that certain items taken from the Strauss residence (e.g., placemats, a briefcase, a wallet, various papers, and a hammer believed to be the murder weapon) were found with the help of a canine police unit in a wooded area not far from the Strauss condominium. None of the items missing from Strauss condominium were found in a search of Franklin's belongings, nor were any of Franklin's clothes or shoes identified has having Strauss' blood on them. A jailhouse informant testified that when he and some other inmates, including Franklin, were discussing how they would deal with any inmate who might testify against one of them at trial, Franklin [*14] said he would "do him," because he "already got one and one more wouldn't hurt." (Trial Tr. at 1079.) The informant also stated that Franklin told him that "they" would never recover the property taken from Strauss' condominium. *Id.* at 1077.

The jury found Franklin guilty on all counts and recommended the death sentence on the aggravated murder conviction. After its independent weighing of the aggravating circumstance against the mitigating factors, the trial court agreed, and Franklin was sentenced accordingly.

STATE COURT PROCEEDINGS

Franklin appealed his convictions and sentences to the Court of Appeals for Hamilton County where he advanced the following six assignments of error:

> 1. The trial court erred to the prejudice of Appellant by denying Appellant's challenges to the constitutionality of the death penalty and in sentencing Appellant to death, for the reason that the Ohio capital punishment statutes are unconstitutional, denying to Appellant the right to due process of law and to the equal protection of the law, and the right to be free from cruel and unusual punishment secured to him by the Eighth and Fourteenth Amendments to the Constitution of the United [*15] States, and to the prohibition against cruel and unusual punishment and guarantees of due course of law and equal protection under the Ohio Constitution in that:
>
> > A. The application of the death penalty is unconstitutional under the Fourteenth Amendment of the United States Constitution and under Article 1, Section 16 of the Ohio Constitution.
> >
> > B. The use of the same operative fact to first elevate what would be "ordinary" murder to aggravated murder, and then to capital, death-eligible aggravated murder permits the State (1) to obtain a death sentence upon less proof in a felony murder case than in a case involving prior calculation and design, although both crimes are ostensibly equally culpable under the Revised Code, and (2) fails to narrow the capital class to those murderers

for whom the death penalty is constitutionally appropriate.

C. The requirement that a jury or three[-]judge panel must recommend death upon proof beyond a reasonable doubt that the aggravating circumstances outweigh only to the slightest degree the mitigating circumstances renders the Ohio capital [punishment] statutes quasi-mandatory and permits the execution of an offender even though [*16] the mitigating evidence falls just short of equipoise with the aggravating factors, with the result that the risk of putting someone to death when it is practically as likely as not that he deserves to live renders the Ohio capital [punishment] process arbitrary and capricious, and, in the absence of a requirement that, before death may be imposed, aggravating factors must substantially outweigh mitigating factors, unconstitutional.

D. The Ohio capital [punishment] statutes are unconstitutionally [sic] in that they do not permit the extension of mercy by the jury or three[-]judge panel even though aggravating factors may only slightly outweigh the mitigating factors.

E. The Ohio capital sentencing scheme is unconstitutional because it provides no standards for sentencing or review at several significant stages of the process and consequently death sentences are imposed, and reviewed, without sufficient

> statutory guidance to juries, trial courts and reviewing courts to prevent unconstitutional arbitrary and capricious infliction to [sic] the death penalty.

2. The trial court erred to the substantial prejudice of Appellant and deprived him of his right [*17] to a fundamentally fair hearing as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, § 6 of the Ohio Constitution by denying Appellant's motion to sever Count Three from Counts One and Two and by allowing the State to proceed on all three counts.

3. The convictions of the defendant-appellant of one (1) count of aggravated murder and two (2) counts of aggravated burglary were against the manifest weight of the evidence and contrary to law.

4. The trial court erred to the prejudice of Defendant-Appellant and denied his constitutionally guaranteed right to a fair trial by allowing the State to introduce during the adjudicative stage of his trial sensational and prejudicial gruesome exhibits.

5. The trial court erred to the substantial prejudice of Defendant-Appellant in not granting Defendant-Appellant's motion for mistrial.

6. The conviction and death penalty sentence herein are invalid as they are based upon jury instructions which are erroneous as a matter of law.

(Return of Writ, Doc. No. 15, Exhibit B.)

The Court of Appeals overruled all of Franklin's assignments of error on the merits and concluded, after independent [*18] review, that the death penalty was appropriate. *State v. Franklin*, 1990 Ohio App. LEXIS 3385, No. C-890028, 1990 WL 117140 (Ohio App. 1st Dist. August 15, 1990). On appeal to the Ohio Supreme Court, Franklin presented the following propositions of law:

> 1. The Ohio Capital Punishment Statutes are unconstitutional, denying Appellant the right to due process of law and to the equal protection of the law, and the right to be free from cruel and unusual punishment secured to him by the Eighth and Fourteenth Amendments to the Constitution of the United States, and to the prohibition against cruel and unusual punishment and guarantees of due course of law and equal protection under the Ohio Constitution in that:
>
> > A. The application of the death penalty is unconstitutional under the Fourteenth Amendment of the United States Constitution and under Article 1, Section 16 of the Ohio Constitution.
> >
> > B. The use of the same operative fact to first elevate what would be "ordinary" murder to aggravated murder, and then to capital, death-eligible aggravated murder permits the state (1) to obtain a death sentence upon less proof in a felony murder case than in a case involving prior calculation [*19] and design, although both crimes are ostensibly equally culpable under the Revised Code, and (2) fails to narrow the capital class to those

murderers for whom the death penalty is constitutionally appropriate . . . .

C. The requirement that a jury or three[-]judge panel must recommend death upon proof beyond a reasonable doubt that the aggravating circumstances outweigh only to the slightest degree the mitigating circumstances renders the Ohio capital [punishment] statutes quasi-mandatory and permits the execution of an offender even though the mitigating evidence falls just short of equipoise with the aggravating factors, with the result that the risk of putting someone to death when it is practically as likely as not that he deserves to live renders the Ohio capital [punishment] process arbitrary and capricious, and, in the absence of a requirement that, before death may be imposed, aggravating factors must substantially outweigh mitigating factors, unconstitutional.

D. The Ohio capital [punishment] statutes are unconstitutional in that they require the death sentence and fail to permit the jury or three[-]judge panel to recommend mercy even though the aggravating [*20] factors only marginally outweigh the mitigating factors, and in spite of the fact that there may be factors strongly suggesting the appropriateness of a penalty less than death in a given case.

E. The Ohio capital sentencing scheme is unconstitutional because it provides no

> standards for sentencing or review at several significant stages of the process and consequently death sentences are imposed, and reviewed, without sufficient statutory guidance to juries, trial courts, and reviewing courts to prevent unconstitutional arbitrary and capricious infliction to [sic] the death penalty. . . .

2. Under Evidence Rule 403 (evidence of other crimes, wrongs or acts) [sic], if the probative value of other acts evidence is substantially outweighed by the prejudicial effect of its admission, it is the duty of the trial court to sever the counts in a multi-count Indictment and grant separate trials. Failure to do so denies the accused his right to a fundamentally fair hearing under the Fourteenth Amendment to the United States Constitution and Article 1, Section 16 of the Ohio Constitution.

3. The convictions of the appellant of one count of aggravated murder and two counts [*21] of aggravated burglary were against the manifest weight of the evidence and must be vacated.

4. The trial court's admission of unnecessary and gruesome exhibits of the body of the deceased and of the crime scene violated Appellant's right to a fair trial.

5. When the trial court comments during the mitigation phase that a defense witness could have testified on behalf of the appellant during trial, the defendant's right to a fair trial is violated and the prejudicial effect of such statement by the court cannot be cured by the trial court's delayed

> instruction to the jury to disregard the court's comment.
>
> 6. When, based on the evidence presented by the State, the trial court fails to give the required instruction as to circumstantial evidence and motive, or lack thereof, and instead gives an instruction which is erroneous as a matter of law, the trial court has committed plain error and the convictions must be reversed.

(Return of Writ, Doc. No. 15, Exhibit E at (i)-(xi).)

On November 20, 1991, the Ohio Supreme Court affirmed Franklin's convictions and sentences. *State v. Franklin*, 62 Ohio St. 3d 118, 580 N.E.2d 1 (1991). Franklin subsequently [*22] filed a Motion for Rehearing in the Ohio Supreme Court (Return of Writ, Doc. No. 15, Exhibit H) challenging the appellate court's proportionality review of his death sentence; the motion was denied (Return of Writ, Doc. No. 15, Exhibit R). Franklin's Petition for a Writ of Certiorari to the United States Supreme Court was also denied. *Franklin v. Ohio*, 504 U.S. 960, 112 S. Ct. 2315, 119 L. Ed. 2d 235 (1992).

On January 23, 1992, Franklin filed a document in the Ohio Supreme Court styled Motion to Recall the Mandate and Permit Supplemental Briefing, where he complained about the representation he was provided during his direct appeals to the Court of Appeals and the Ohio Supreme Court. Franklin argued that because his counsel failed to communicate with him, refused to argue issues Franklin believed were meritorious, and never advised him that he could file a pro se brief, he should be permitted to submit supplemental briefing on the following ten issues:

> 1. The State of Ohio perempted two of only three black jurors in the venire in violation of *Batson v.*

Kentucky and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. [*23] . . .

2. The jury was unconstitutionally composed because it underrepresented black persons in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments and *Hernandez v. Texas* . . . and *Duren v. Missouri* . . . .

3. The trial court failed to grant a mistrial based on the actions of juror Patricia Arthur. At the jury view, Ms. Arthur pointed to a window and asked if it was the window where the defendant broke in. Tr. 701-03. This statement, combined with the fact that during voir dire she expressed the opinion that Mr. Franklin should prove his innocence, demonstrated that Ms. Arthur had prematurely determined Mr. Franklin's guilt. Her service as a juror in this case violated Mr. Franklin's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

4. Defense counsel was not permitted to have individual voir dire; both the defense and prosecution requested such voir dire and the trial court denied the requests, . . . in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5. The trial court denied the defense request for investigative services [*24] in violation of *Ake v. Oklahoma* . . .; *State v. Jenkins* . . . .

6. Prejudicial victim impact evidence was introduced into the guilt phase through prosecutorial misconduct and testimony of the

> victim's fiancee, Karen Strain, . . . in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and *State v. White* . . . .
>
> 7. The trial court erroneously instructed at both the guilt and penalty phases. These errors included the definition of reasonable doubt, purpose, cause and theft offense. ... The instructional errors violated Mr. Franklin's rights as guaranteed by Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 8. The opinion issued by the trial court contained errors; specifically the weighing process used to determine that death was the appropriate punishment. The resulting death sentence violated the Fifth, Eighth and Fourteenth Amendments.
>
> 9. The ineffective assistance rendered by trial counsel throughout the trial in violation of *Strickland v. Washington* . . ., and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 10. The insufficient R.C. 2929.05(A) [*25] review conducted by the Court of Appeals in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

(Return of Writ, Doc. No. 15, Exhibit N.) Although not appended to the Return of Writ, the original docket from Franklin's direct appeals contains an entry journalized on February 20, 1992, which states in its entirety, "Upon consideration of appellant's motion to recall mandate and permit supplemental briefing, IT IS ORDERED by the Court that said motion to recall mandate and permit briefing be, and

the same is hereby, denied." *State v. Franklin*, Case No. 90-1914, Ohio Supreme Court Doc. No. 32 (February 20, 1992).

On March 16, 1993, Franklin filed a petition for post-conviction relief in the Hamilton County Court of Common Pleas pursuant to Ohio Rev. Code § 2953.21, raising the following sixty-three claims for relief:

> 1. The trial court denied Petitioner Franklin his rights to due process, equal protection, effective assistance of counsel, statutory rights and rights under the Ohio Supreme Court's Rules of Superintendence for Courts of Common Pleas, under the Fifth, Sixth, Eighth and Fourteenth Amendments [*26] to the United States Constitution when it failed to provide him with expert assistance as those services were reasonably necessary to adequate trial representation.
>
> 2. Petitioner Franklin's sentences are void or voidable because the trial court denied Petitioner his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, his rights under the Rules of Superintendence for Courts of Common Pleas and his statutory rights by failing to provide him with expert assistance [relating to the fingerprint evidence] when those services were reasonably necessary to adequate trial preparation.
>
> 3. Petitioner Franklin['s] convictions and sentences are void and/or voidable because the trial court denied Petitioner Franklin his due process, equal protection, effective assistance of counsel, statutory rights and rights under the Ohio Supreme Court[']s Rules of Superintendent [sic] for the Courts of Common Pleas.

4. Petitioner Franklin's conviction and sentences are void/voidable because the trial court denied Petitioner Franklin's rights under the Fourth and Fourteenth Amendments when it failed to suppress testimony about false names allegedly used by Petitioner Franklin. [*27]

5. Petitioner Franklin's convictions are void and/or voidable because the State of Ohio obtained testimony by threats and/or coercion against one of its key witnesses: Glenn Davis.

6. Petitioner Franklin was denied his right to a fair trial by an impartial jury in his capital case as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when the trial court failed to excuse for cause three (3) jurors whose statements during voir dire indicated that they would automatically return a death verdict upon a finding of guilt.

7. Petitioner Franklin's convictions and sentences are void or voidable because the service of biased jurors on his jury violated his right to a trial by a fair and impartial jury and to due process under the Sixth and Fourteenth Amendments to the United States Constitution.

8. Petitioner's convictions and sentences are void or voidable because the service of a biased juror on the jury in Petitioner's case violated his right to trial by a fair and impartial jury and to due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

9. Petitioner's convictions and sentences [*28] are void or voidable because the trial court denied him his right to a representative jury and equal

protection under the Sixth and Fourteenth Amendments to the United States Constitution.

10. Petitioner's convictions and sentences are void or voidable because the state excluded members of the jury panel on account of their gender in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

11. Petitioner's convictions and sentences are void or voidable because of errors by the trial court during its preliminary guilt phase instructions to the jury that violated Petitioner's right[s] under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

12. Petitioner's convictions and sentences are void or voidable because the trial court denied Petitioner's request for lesser included instructions on murder and involuntary manslaughter in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

13. Petitioner's convictions and sentences are void or voidable because the trial court committed several serious errors when it instructed the jury at the guilt phase in violation [*29] of the Fifth, Sixth, Eighth[] and Fourteenth Amendments to the United States Constitution.

14. Petitioner Franklin's convictions and sentences are void and/or voidable because the trial court failed to keep a complete record of the proceedings.

15. Petitioner Franklin's convictions and sentences are void or voidable because the

admission of prejudicial "prior bad acts" evidence at the guilt phase violated Petitioner's right to due process and a fair trial as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United State[s] Constitution.

16. Petitioner's convictions and sentences are void or voidable because the court improperly restricted Petitioner's cross-examination of Michael Turnbolt.

17. Petitioner Franklin's convictions and sentences are void and/or voidable because the trial court improperly excluded several prospective jurors under the wrong standard.

18. Petitioner Franklin's convictions and sentences are void or voidable because the prosecutor's misconduct interjected irrelevant and prejudicial evidence about the victim into the guilt phase of Petitioner's trial in violation of State rules of evidence, and the Sixth, Eighth [*30] and Fourteenth Amendments to the United States Constitution.

19. Petitioner's convictions and sentences are void or voidable because the admission of hearsay evidence violated Petitioner's rights of confrontation of witness and due process under the Sixth and Fourteenth Amendments to the United States Constitution.

20. Petitioner Franklin's convictions and sentences are void or voidable because the trial court violated Petitioner's right against self-incrimination in violation of the Fifth and Fourteenth Amendments.

21. Petitioner Franklin's convictions and sentences are void or voidable because the trial court allowed the jury to rehear Catherine Schaffner's testimony in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

22. Petitioner Franklin's convictions are void or voidable because the trial court admitted an inflammatory and prejudicial videotape of the crime scene in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

23. Petitioner Franklin's convictions and sentences are void and/or voidable because the State of Ohio introduced [*31] gruesome and cumulative photographs and slides of Gerald Strauss.

24. Petitioner Franklin['s] convictions and sentences are void or voidable because the trial court made inflammatory and prejudicial remarks about the victim's family in violation of Petitioner['s] rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

25. Petitioner's convictions and sentences are void or voidable because the prosecutor's misconduct during voir dire that violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution . . .

.

26. Petitioner's conviction's [sic] and sentences are void or voidable because of prosecutorial misconduct during the guilt phase of this capital

trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

27. Petitioner's convictions and sentences are void or voidable because the trial court denied Petitioner's motion to sever the charge of aggravated burglary against Rosha Winston from the charges of aggravated murder and aggravated burglary against Gerald Strauss.

28. Petitioner's convictions and [*32] sentences are void or voidable because of prejudicial, pretrial publicity that violated his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

29. Petitioner['s] convictions and sentences are void or voidable because the coroner, Dr. Lehman, expressed an opinion that a specific hammer . . . caused Petitioner's [sic] death. . . . in violation of Petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

30. Petitioner's convictions and sentences are void or voidable because he was convicted and sentenced on insufficient State's evidence in violation his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

31. Petitioner's death sentence is void or voidable because no psychologist evaluated Petitioner for his capital trial, in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

32. Petitioner Franklin's death sentence is void or voidable because of erroneous instructions to the jury at the penalty phase of his capital trial that violated Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the [*33] United States Constitution.

33. Petitioner Franklin's conviction and sentence are void and/or voidable because defense counsel did not request nor did the trial court appoint a social worker to assist counsel in identifying, interviewing and preparing witnesses for the mitigation phase of trial.

34. Petitioner Franklin's death sentence is void or voidable because the preclusion of mitigation evidence at Petitioner's penalty hearing violated his right to a reliable sentencing determination by an informed jury, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

35. Petitioner Franklin's death sentence is void and/or voidable because it is unreliable and inappropriate in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

36. Petitioner Franklin's death sentence is unreliable and inappropriate because he was denied the procedural safeguard of a meaningful, independent review of the jury's death recommendation by the trial court in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

37. Petitioner Franklin's death sentence is void and/or voidable [*34] because the cumulative

effect of the prosecutor's misconduct at the penalty phase of Petitioner's capital trial violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

38. The judgments and sentences against Petitioner Franklin are void or voidable because the same felony (aggravated burglary) formed the basis for the elevation of Murder to Aggravated Murder, and then to elevate the Aggravated Murder to Capital Aggravated Murder.

39. Petitioner Franklin's conviction and sentence are void and/or voidable because Ohio's reviewing courts failed to fulfill their statutory duty to meaningfully review the proportionality of Petitioner's death sentence.

40. Petitioner Franklin's conviction and sentence are void and/or voidable because the Ohio Death Penalty Scheme, on its face and as applied in this case, violates the United States and Ohio Constitutions.

41. Petitioner Franklin's conviction and sentence are void and/or voidable because the Ohio death penalty is in violation of international laws and Article VI of the United States Constitution.

42. Petitioner Franklin's conviction and sentence are void [*35] and/or voidable because the State of Ohio, on appeal, failed to establish beyond a reasonable doubt that any constitutional error which occurred during Petitioner's trial did not contribute to the convictions and sentences of Petitioner Franklin.

43. Petitioner Franklin's conviction and sentence are void and/or voidable because he was denied a fair trial and impartial review of his death sentence.

44. Petitioner Franklin's conviction and sentence are void and/or voidable because O.R.C. Section 2929.03(D)(1) is unconstitutional, in that it does not require an examination and investigation of each defendant who is facing the death penalty. Furthermore, O.R.C. Section 2929.03(D)(1) unconstitutionally mandates that the results of any mental examination and background investigation performed pursuant to this statute must be furnished to the trial court, the jury and the prosecutor.

45. Petitioner Franklin's conviction and sentence are void and/or voidable because the trial court admitted "other act testimony" pursuant to O.R.C. Section 2945.59 and Evid. R. 404. . . . Said Statute and Rule are unconstitutional because the Statute and Rule permits [sic] the jury to convict [*36] and sentence criminal defendants by evidence of acts for which they are not charged and/or convicted.

46. Petitioner Franklin's conviction and sentence are void and/or voidable because the State's use of a jailhouse informant to secure his conviction deprived Petitioner Franklin of his rights as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

47. Petitioner Franklin's conviction and sentence are void and/or voidable because the policies adopted and procedures employed by the

Hamilton County Prosecutor's Office in seeking and securing capital convictions and death sentences violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

48. Petitioner Franklin's conviction and sentence are void and/or voidable because Mr. Franklin was sentenced to death in a county where the death penalty is applied in a racially discriminatory manner, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

49. Petitioner Franklin's conviction and sentence are void and/or voidable because prior to trial, counsel for Petitioner filed a Notice of Alibi [*37] pursuant to Crim. R. 12.1.

50. Petitioner Franklin's conviction and sentence are void and/or voidable because the trial court's instructions to the jury, coupled with the prosecutor's improper arguments, impermissibly mandated a sentence of death, thereby depriving Petition [sic] Franklin of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

51. Petitioner Franklin's conviction and sentence are void and/or voidable because the State of Ohio failed to disclose impeaching information which undermined the credibility of its witnesses, including jailhouse informant Larry Weaver.

52. Petitioner Franklin's conviction and sentence are void and/or voidable because the procedures and instructions of the trial court during voir dire skewed this entire capital proceeding in favor of

guilt verdicts and of the death penalty in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

53. Petitioner Franklin's conviction and sentence are void and/or voidable because of the trial court's refusal to order access to evidence needed by Petitioner to pursue his statutorily authorized [*38] post-conviction rights.

54. Petitioner Franklin's conviction and sentence are void and/or voidable because because [sic] the State of Ohio failed to provide relevant discovery of potentially exculpatory evidence and impeachment evidence at the guilt phase of the proceedings.

55. Petitioner Franklin's conviction and sentence are void and/or voidable because Petitioner Franklin was deprived of his right to the effective assistance of counsel during the trial phase of his case in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

56. Petitioner Franklin's conviction and sentence are void and/or voidable because Petitioner's trial counsel's performance did not meet the level of performance guaranteed by the Ohio and United States Constitution[s].

57. Petitioner Franklin's convictions and sentences are void or voidable because he was denied the procedural safeguard of a meaningful, independent review of the jury's death recommendation, and of the trial court's review by the court of appeal[s], in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

58. Petitioner Franklin's convictions and sentences [*39] are void or voidable because there was insufficient evidence that Petitioner had a specific intent to kill, therefore aggravated his murder conviction violate [sic] the Eighth and Fourteenth Amendments to the United States Constitution.

59. Petitioner Franklin's conviction and sentence are void and/or voidable because the grand jury proceedings were not recorded as required by Crim. R. 22.

60. Petitioner Franklin's conviction and sentence are void and/or voidable because the State of Ohio selectively prosecuted Mr Franklin when the State had identified other suspects or participants including State witness Michael Turnbolt who were not prosecuted.

61. Petitioner Franklin's conviction and sentence are void and/or voidable because the State of Ohio used inaccurate and/or false testimony to convict Petitioner in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the Confrontation Clause of the Sixth Amendment to the United States Constitution as made applicable to the individual States by the Fourteenth Amendment to the United States Constitution; [sic] the Cruel and Unusual Punishment Clause of the Eighth [*40] Amendment as made applicable to the individual States, the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of the Ohio Constitution.

62. Petitioner Franklin's conviction and sentence are void and/or voidable because [the] trial court

> and the State of Ohio interfered with Petitioner's right to effective assistance of counsel by denying access to and failing to disclose exculpatory information material to the guilt phase of the proceedings.
>
> 63. Petitioner Franklin's conviction and sentence are void and/or voidable because the state failed to produce one of its key witnesses, Rosha Winston, at trial and Ms. Winston was not truly unavailable. Thus, Petitioner was denied his right under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution to confront a witness against him. Petitioner was also denied his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, Section 16 of the Ohio Constitution.

(Return of Writ, Doc. No. 15, Exhibit W.) The Hamilton County Common Pleas Court dismissed the post-conviction relief [*41] petition without an evidentiary hearing, and Franklin appealed to the Court of Appeals for Hamilton County, raising the following assignments of error:

> 1. The trial court erred in denying Petitioner's motion to independently test the State's fingerprint evidence as well as the fifty-third claim of the post-conviction petition. . . . These denials violated Petitioner's due process rights guaranteed by the Fifth, [sic] and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Ohio Constitution.
>
> 2. The trial court erred in its application of the doctrine of res judicata to Appellant's claims for relief, thus violating his rights under the Fifth,

Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Section[s] 1, 2, 9, 10, 16 and 20 of the Ohio Constitution.

3. The trial court erred when it denied Appellant Franklin an evidentiary hearing on his petition for post-conviction relief, thus violating his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16, and 20 of the Ohio Constitution.

4. The [*42] trial court erred to Appellant Franklin's prejudice because it adopted in toto the Appellee's error-laden findings of fact and conclusions of law based on an insufficient review of the pleadings and without providing Appellant Franklin an opportunity to respond to the Appellee's flawed proposal in violation of Appellant's rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16, and 20 of the Ohio Constitution.

5. The trial court erred when it denied Appellant's motion to allow discovery because the court's order violated Appellant's rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 9, 10, 16, and 20 of the Ohio Constitution.

6. The trial court erred because it denied Appellant's fifty-first, fifty-fourth and sixty-first claims for relief (*Brady* information) in violation of his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States

Constitution and Article I, Sections 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.

7. The trial court erred when it dismissed [*43] Appellant's fourth, thirty-fourth, fifty-fifth, fifty-sixth and sixty-second claims for relief (ineffective assistance of counsel), in violation of Appellant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10and 16 of the Ohio Constitution.

8. The trial court erred in denying Appellant's first, second, third, thirty-first and thirty-third claims for relief (expert assistance) in violation of his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections 1, 2, 5, 9, 10, 16and 20 of the Ohio Constitution.

9. The trial court erred when it denied Appellant relief on his sixth, seventh, eighth, ninth, tenth, seventeenth and fifty-second claims (fair and impartial jury) in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 1, 2, 9, 10, 16and 20 of the Ohio Constitution.

10. The trial court erred because it denied Appellant Franklin's twenty-fourth, twenty-seventh, twenty-eighth, forty-sixth, fifty-ninth and sixty-third claims for relief (trial error) in violation [*44] of his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 5, 9, 10, 16and 20 of the Ohio Constitution.

11. The trial court erred because it dismissed Appellant Franklin's fifteenth, eighteenth, nineteenth, twenty-first, twenty-second and twenty-third claims for relief (evidentiary errors), in violation of Appellant's rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 9, 10, 16and 20 of the Ohio Constitution.

12. The trial court erred because it denied Appellant Franklin's eleventh, twelfth, thirteenth and thirty-second claims for relief (jury charges), in violation of Appellant's rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 2, 5, 9, 10, 16and 20 of the Ohio Constitution.

13. The trial court erred because it dismissed Appellant Franklin's fifth, twenty-fifth, twenty-sixth, thirty-seventh, forty-seventh, forty-eighth and sixtieth claims for relief (state misconduct) in violation of his rights under the Fifth, Sixth, [*45] Eighth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, Sections, 1, 2, 5, 9, 10, 16and 20 of the Ohio Constitution.

14. The trial court erred because it denied Appellant Franklin's thirtieth and fifty-eighth claims for relief, (sufficiency of the evidence), in violation of Appellant's rights under the Eighth and Fourteenth Amendment[s] [to the United States Constitution] and Article I, Sections 9and 16 of the Ohio Constitution.

> 15. The trial court erred when it denied Appellant Franklin's thirty-fifth, thirty-sixth, thirty-ninth, forty-second, forty-third, fiftieth and fifty-seventh claims for relief (sentencing errors) in violation of Appellant's rights when [sic] the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, Sections, [sic] 1, 2, 5, 9, 10, 16, and 20 of the Ohio Constitution.
>
> 16. The trial court erred when it dismissed Appellant Franklin's thirty-eighth, fortieth, forty-first, forty-second, forty-fourth, forty-fifth, and forty-ninth claims (constitutional challenges), in violation of his rights under the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the [*46] United States Constitution and Article I, Sections 2, 9, 10, 16and 20 [of the Ohio Constitution].

(Return of Writ, Doc. No. 15, Exhibit LL.) The Hamilton County Court of Appeals denied Franklin's appeal. *State v. Franklin*, 1995 Ohio App. LEXIS 183, No. C-930760, 1995 WL 26281 (Ohio App. 1st Dist., January 25, 1995). Though Franklin apparently filed an Application for Reconsideration of the Court of Appeals' decision (Return of Writ, Doc. No. 15, Exhibit SS), the court never ruled on the motion and, under Ohio law, it is consequently presumed to have been overruled. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St. 3d 217, 223, 1994 Ohio 92, 631 N.E.2d 150 (1994).

On appeal to the Ohio Supreme Court, Franklin raised the following eighteen propositions of law for consideration:

> 1. When a death penalty is affirmed by a denial of a petition for post-conviction relief, a post-

conviction petitioner has an appeal as a matter of right to the Supreme Court of Ohio.

2. A trial court cannot deny a capital defendant access to crucial evidence against him in post-conviction proceedings.

3. A trial court cannot apply the doctrine of res judicata to [*47] dismiss a post-conviction petition when the trial court has not thoroughly reviewed the record, petitioner's claims are supported by evidence dehors the record, and there is an insufficient factual predicate to support that finding.

4. A trial court cannot deny an evidentiary hearing to a post-conviction petitioner when his petition is sufficient on its face to raise constitutional claims which depend on factual allegations that cannot be determined from the record.

5. A post-conviction petitioner is denied due process when the trial court dismisses his petition based upon findings of fact and conclusions of law that are inadequate and/or erroneous and Petitioner had no meaningful chance to respond.

6. A trial court cannot summarily dismiss a post-conviction petition without affording the petitioner the opportunity to conduct discovery of facts and evidence necessary to justify his opposition to summary dismissal.

7. A capital defendant's due process rights are violated when the State fails to disclose material exculpatory and impeaching evidence at trial.

8. The conviction[s] and sentences of a defendant must be reversed when he is denied the effective

assistance [*48] of counsel at both the guilt and penalty phases of his capital trial.

9. A capital defendant is denied his right[s] to due process and to a fair trial when the court fails to provide expert assistance at trial.

10. A capital defendant is denied his right[s] to due process and to a fair trial when the trial court fails to ensure that he has a fair and impartial jury.

11. A trial court cannot dismiss a post-conviction petition when the petitioner raises numerous instances of trial error which violated his constitutional rights.

12. A trial court cannot dismiss a post-conviction petition when the petitioner raises numerous evidentiary errors which violated his constitutional rights.

13. A trial court cannot dismiss a post-conviction petition when the petitioner raises numerous erroneous jury charges which violated his constitutional rights.

14. A trial court cannot dismiss a post-conviction petition when the petitioner raises numerous instances of state misconduct which violated his constitutional rights.

15. A trial court cannot dismiss a post-conviction petition when the petitioner shows that he was convicted and sentenced to death upon insufficient [*49] evidence.

16. A trial court cannot dismiss a post-conviction petition when the petitioner shows that constitutional errors make his death sentence unreliable.

> 17. Ohio's death penalty scheme is unconstitutional.
>
> 18. A court of appeals cannot affirm the dismissal of a post-conviction petition without a review of the entire record.

(Return of Writ, Doc. No. 15, Exhibit UU.) The appeal was summarily denied, *State v. Franklin*, 72 Ohio St. 3d 1538, 650 N.E.2d 479 (1995), as was Franklin's subsequent Motion for Reconsideration, *State v. Franklin*, 73 Ohio St. 3d 1429, 652 N.E.2d 801 (1995). The United States Supreme Court denied certiorari. *Franklin v. Ohio*, 516 U.S. 950, 116 S. Ct. 394, 133 L. Ed. 2d 315 (1995).

On June 30, 1993, during the pendency of his post-conviction proceedings, Mr. Franklin filed a Motion for Delayed Reconsideration with a supporting memorandum in the Court of Appeals for Hamilton County. There, he advanced the following assignments of error:

> 1. Appellant was denied in the effective assistance of counsel on his appeal as of right in violation of the Due Process Clause of the Fourteenth [*50] Amendment.
>
> 2. Appellant Franklin was denied his right to a fair trial by an impartial jury in his capital case as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by the biased service of Patricia Arthur on his jury.
>
> 3. Two black jurors were excluded from Appellant's jury on account of their race which violated Mr. Franklin's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
>
> 4. The trial court erred when it failed to appoint a criminal investigator for Mr. Franklin in violation

of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

5. Mr. Franklin's trial counsel was ineffective to his prejudice in violation of Mr. Franklin's rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6. Mr. Franklin was denied his right to the effective assistance of counsel during the penalty phase of his trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7. Appellant Franklin was denied his right to confront a witness in violation of his right [*51] to due process and a fair trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

8. Appellant Franklin's death sentence is unreliable and inappropriate because he was denied the procedural safeguard of a meaningful, independent review of the jury's death recommendation by the trial court in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

9. Appellant Franklin's death sentence is unreliable and inappropriate because he was denied the procedural safeguard of a meaningful, independent review of his death sentence by the court of appeals in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

10. Appellant Franklin's death sentence is unreliable, and inappropriate, in violation of the

Eighth and Fourteenth Amendments to the United States Constitution.

11. The trial court improperly instructed the jury in the guilt phase of Appellant Franklin's trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

12. The State commented on Mr. Franklin's post-arrest silence in violation of his [*52] rights under the Fifth and Fourteenth Amendments to the United States Constitution.

13. The State's use of a premortem photograph and of victim impact statements violated Mr. Franklin's rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

14. Misconduct by the prosecutor during voir dire deprived Mr. Franklin of his rights to due process, a fair trial and a reliable sentence as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

15. The trial court's erroneous instructions at the guilt [sic][2] phase of Appellant Franklin's capital trial violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

16. Misconduct by the prosecutor during the penalty phase of Appellant Franklin's capital trial

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[2] Though the asserted assignment of error claims error resulted from the court's instruction during the guilt phase of Franklin's trial, the argument following the assignment relates to instructions given in the penalty phase of the trial.

deprived him of his rights to due process, a fair trial, and a reliable determination of his guilt and punishment, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

17. The trial court's preclusion of mitigating evidence at Mr. Franklin's penalty the penalty phase of his [*53] capital trial [sic] violated Mr. Franklin's right to a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

18. Mr. Franklin's right[s] to due process and against cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution were violated because there was insufficient evidence to prove that Appellant had [a] specific intent to kill.

19. The admission of a videotape depicting gruesome scenes and the use of gruesome photos and slides violated Appellant Franklin's Sixth, Eighth, and Fourteenth Amendment rights to a fair trial, due process and a reliable determination of his guilt and sentence.

20. Appellant Franklin's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated when the trial court joined dissimilar charges against Appellant.

21. The trial court denied Appellant his rights to due process, equal protection, and an impartial jury under the Fifth, Sixth, Eighth and Fourteenth Amendments when the court denied a requested instruction on involuntary manslaughter.

22. The admission of hearsay evidence [*54] violated Appellant's right to confront witnesses and to due process under the Sixth and Fourteenth Amendments to the United States Constitution.

23. Appellant Franklin's sentence of death violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because the constitutionally mandated review was done from an incomplete record.

24. The State's reliance on irrelevant and prejudicial other acts evidence in the trial phase deprived Mr. Franklin of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

25. Appellant Franklin was denied his right to a fair trial by an impartial jury in his capital case as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when the trial court failed to excuse for cause biased jurors.

26. Appellant Franklin was denied his right to a fair trial by an impartial jury in a capital case, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, when the trial court excused for cause all prospective jurors who voiced any reservations about the death penalty.

27. Appellant [*55] Franklin's conviction on insufficient evidence violated his right to due process under the Fourteenth Amendment to the United States Constitution and his right to a reliable death sentence under the Eighth Amendment to the United States Constitution.

28. The trial court's comments regarding preliminary jury instructions and an instruction at voir dire denied Appellant his right to a presumption of innocence as guaranteed by the Fifth and Fourteenth Amendments.

29. Erroneous instructions to the jury at the penalty phase violated Appellant's right[s] to due process and to a fair and reliable determination of the appropriate penalty, as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

30. Mr. Franklin was denied his rights as guaranteed by the Eighth and Fourteenth Amendments because the trial court elicited prejudicial sympathy for the victim's family.

31. Mr. Franklin was denied his right[s] to due process, to equal protection and to an impartial jury under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

32. Appellant Franklin was denied his rights under the Fifth, Eighth and Fourteenth [*56] Amendments because Revised Code Section 2929.03(D)(1) is unconstitutional on its face and as applied to Appellant.

33. Rule 12.1 of the Ohio Rules of Criminal Procedure mandates specific pretrial disclosures by a defendant in a criminal case who proposes to offer testimony to establish an alibi on his behalf, but contains no reciprocal disclosure requirements for the State of Ohio. The application of this rule in Appellant Franklin's case deprived him of his rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

> 34. Mr. Franklin's death sentence is unreliable and inappropriate because he was denied the procedural safeguard of a meaningful proportionality and appropriateness review of his death sentence by this Court of Appeals in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(Return of Writ, Doc. No. 15, Exhibit DDD.) The Court of Appeals for Hamilton County denied Franklin's request for delayed reconsideration on March 3, 1994, stating that Franklin had failed to show good cause why the Application for Reconsideration had not been filed within ninety days of the court's judgment [*57] in Franklin's direct appeal. (Return of Writ, Doc. No. 15, Exhibit GGG.) Moreover, the court found the fact that Franklin had been represented by the same counsel in his direct appeals to the Court of Appeals and the Ohio Supreme Court was insufficient to establish good cause for Franklin's failure to file his Application for Delayed Reconsideration until one and a half years after the Ohio Supreme Court rendered its decision in his direct appeal. *Id.*

On April 29, 1994, Franklin filed an appeal from the Court of Appeals decision in the Ohio Supreme Court, advancing the following propositions of law:

> 1. The appellant shows good cause for filing an application for delayed reconsideration alleging ineffective assistance of appellate counsel beyond the time prescribed [*58] by the Rules of Appellate Procedure when he is represented by the same appellate attorneys in the Court of Appeals and the Supreme Court. When the Court of Appeals denies the appellant's Application for Delayed Reconsideration it violates his right to

> due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.
>
> 2. The appellant's rights to due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution are violated when his appellate counsel ignore him, fail to brief and argue meritorious issues in his case and fail to advise him of his pro se briefing rights.
>
> 3. The retroactive application of a procedural requirement which results in the dismissal of a legal appeal is constitutionally infirm in violation of the Eighth and Fourteenth Amendments to the United States Constitution and the Ex Post Facto Clause of the United States Constitution and of the Ohio Constitution.

(Return of Writ, Doc. No. 15, Exhibit HHH.) Franklin's appeal was summarily dismissed by the Supreme Court of Ohio. (Return of Writ, Doc. No. 15, Exhibit JJJ.) On July 29, 1994, Franklin [*59] filed a Motion for Reconsideration of that appeal, contending as follows:

> 1. George Franklin's right to due process under the Fourteenth Amendment was violated because his appellate counsel breached their duties to advocate and to use their professional skill and judgment in his case.
>
> 2. George Franklin's right to due process under the Fourteenth Amendment was violated because his appellate counsel breached their duties to inform and consult.

3. George Franklin's right to due process under the Fourteenth Amendment was violated by Appellant counsel's conflict of interest.

4. George Franklin's right to due process under the Fourteenth Amendment was violated because his appellate counsel failed to raise the trial court's denial of his motion for an investigator.

5. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to argue the impropriety of his death sentence.

6. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise the service of a biased juror.

7. George Franklin's right to due process under the Fourteenth Amendment [*60] was violated because appellate counsel failed to raise the prejudicial remark of the trial court.

8. George Franklin's right to due process under the Fourteenth Amendment was violated because the appellate counsel failed to raise the State's discriminatory use of its peremptory challenges.

9. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise the ineffective assistance of trial counsel.

10. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise prejudicial errors in the jury charges.

11. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise the admission of victim impact evidence at the guilt phase.

12. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise the issue of prosecutorial misconduct at trial.

13. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to effectively argue the prejudice which arose from [*61] the trial court's denial of his motion to sever the charge of the aggravated burglary of Rosha Winston['s apartment] from the charges of the aggravated murder and the aggravated burglary of Gerald Strauss [and his apartment, respectively].

14. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise errors in the opinion of the First District Court of Appeals.

15. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to raise errors in the trial court's written opinion.

16. George Franklin's right to due process under the Fourteenth Amendment was violated because appellate counsel failed to argue that the trial court erred when it wrongfully excluded jurors who had mere reservations about capital punishment.

17. George Franklin's right to due process under the Fourteenth Amendment was violated because

> appellate counsel failed to argue that a proportionality review that considers only cases in which death was imposed is inadequate. Further, appellate counsel should have argued that the failure of Ohio trial courts to file sentencing [*62] opinions in cases in which juries have returned life verdicts has resulted in a biased and incomplete proportionality review by state appellate courts.

(Return of Writ, Doc. No. 15, Exhibit KKK.) The Ohio Supreme Court denied Franklin's Motion for Reconsideration on September 7, 1994. (Return of Writ, Doc. No. 15, Exhibit MMM.)

ANALYSIS

Franklin filed his Petition for Writ of Habeas Corpus on November 14, 1995, prior to the April 24, 1996, effective date of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, codified in relevant part at 28 U.S.C. § § 2254 (hereinafter "AEDPA"). Consequently, the applicable standard under which this Court must determine the merits of Franklin's asserted grounds for relief is that which existed prior to enactment of the AEDPA. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997); *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999).

In *McQueen v. Scroggy*, 99 F.3d 1302, 1310 (6th Cir. 1996), the Sixth Circuit Court of Appeals summarized the pre-AEDPA habeas corpus standard as follows:

> Pursuant to 28 U.S.C. § 2254(d) [*63] , [a federal court] presume[s] a state trial or appellate court's conclusions as to facts[, after a hearing on the merits,] are correct unless the petitioner demonstrates by convincing evidence that the

facts are erroneous under one of the eight conditions enumerated in 28 U.S.C. § 2254(d)(1)-(8). *Sumner v. Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303, 1306-07, 71 L. Ed. 2d 480, (1982)(per curiam); *Levine v. Torvik*, 986 F.2d 1506, 1514 (6th Cir. [1993]), *cert. denied*, 509 U.S. 907, 113 S. Ct. 3001, 125 L. Ed. 2d 694 (1993); *Hart v. Marion Correctional Inst.*, 927 F.2d 256, 257 (6th Cir. [1991]), cert. denied, 502 U.S. 816, 112 S. Ct. 70, 116 L. Ed. 2d 44 (1991); *Nichols v. Perini*, 818 F.2d 554, 557 (6th Cir. 1987). . . .

The presumption only applies to basic, primary facts, and not to mixed questions of law and fact. Levine, 986 F.2d at 1514 (question of mental competency is a mixed question of law and fact, subject to de novo review); *Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (ineffective assistance [*64] of counsel claim is a mixed question of law and fact, subject to de novo review); *Smith* [*v. Jago*], 888 F.2d [399] 407 [(6th Cir. 1989)] (same). The presumption also applies to implicit findings of fact, logically deduced because of the trial court's ability to adjudge the witnesses' demeanor and credibility. Indeed, the presumption applies with particular force to credibility determinations, as the Supreme Court has ruled that such determinations receive "special deference" from the federal courts. *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S. Ct. 2885, 2892, 81 L. Ed. 2d 847 (1984); *see Brown* [*v. Davis*], 752 F.2d 1142, 1147 [(6th Cir. 1985)].

Where the state court findings have support in the record, those findings must control, even though the federal habeas court might have rendered contrary findings that also would have support in

> the record. *Wainwright v. Goode*, 464 U.S. 78, 85, 78 L. Ed. 2d 187, 104 S. Ct. 378 (1983) (if two different conclusions find fair support in the record, a federal court may not substitute its view of the facts for that of the state court). If a federal district court [*65] does not defer to the state court findings of fact, it must provide a written justification and state which of the first seven factors under § 2254(d) are present, or it must provide reasons for concluding that the state court findings are not fairly supported by the record, pursuant to the eighth factor of § 2254(d). *Sumner* [*v. Mata*, 449 U.S. 539, 551, 66 L. Ed. 2d 722, 101 S. Ct. 764[, (1981)].

The eight factors mentioned above by the Circuit Court of Appeals provide that the presumption of correctness given a state court's factual determination may be overcome when the petitioner establishes, the respondent admits, or it otherwise appears that:

> 1. The merits of the factual dispute were not resolved in the State court hearing;
>
> 2. The factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> 3. The material facts were not adequately developed at the State court hearing;
>
> 4. The State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> 5. The applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint [*66] counsel to represent him in the State court proceeding;

> 6. The applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> 7. The applicant was otherwise denied due process of law in the State court proceeding;
>
> 8. Or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

28 U.S.C. § 2254(d)(1)-(8) (1966), amended by 28 U.S.C. § 2254 (Supp. 2000). Overcoming the presumption of correctness due a state court factual finding not falling within one of the eight enumerated exceptions may be accomplished by convincing evidence that the factual determination of the state court was erroneous. 28 U.S.C. § 2254(d). The burden rests with the applicant. *Id.*

A petitioner may not, however, raise a [*67] federal constitutional issue on federal habeas that he or she could not raise in the state courts because of a procedural default. *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his or her right to federal habeas corpus review. *Murray* v. Carrier, 477 U.S. 478, 485, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); Engle, 456 U.S. at 129; *Wainwright*, 433 U.S. at 87; *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000). *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

Moreover, failure to raise a constitutional issue at all on direct appeal is subject to the cause and prejudice standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). *Murray*, 477 U.S. at 485; *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); [*68] *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1985). Failure to present an issue to the state supreme court on discretionary review constitutes procedural default as well. *O'Sullivan v. Boerckel*, 526 U.S. 838, 847-48, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999).

The Sixth Circuit Court of Appeals requires a four-part analysis when a habeas respondent alleges a petitioner's claim is precluded by procedural default. *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). In *Maupin*, the Sixth Circuit Court of Appeals set forth the following analytical framework for determining whether a claim has been procedurally defaulted:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
>
> . . . .
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the [*69] state can rely to foreclose review of a federal constitutional claim.
>
> . . . .

> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin, 785 F.2d at 138.

Guided by these principles, the Court proceeds to the merits of Franklin's asserted grounds for relief which will be addressed in an order that facilitates a navigable discussion of the issues raised. This Court will first address whether Franklin's ineffective assistance of appellate counsel claims have been procedurally defaulted, thereby eliminating their usefulness as "cause" for Franklin's having failed to raise the underlying ineffective assistance of trial counsel and trial court error claims on direct appeal. *See Edwards v. Carpenter*, 529 U.S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Next, since the success of many of Franklin's ineffective assistance of appellate counsel and ineffective assistance [*70] of trial counsel sub-claims in Grounds for Relief One and Two depend upon the concomitant success of his remaining claims, Grounds for Relief Three through Twenty-eight, the Court will address the merits of the latter group of claims. If an underlying claim is found to be meritorious, the Court will discuss at that time whether Franklin's appellate counsel, and if appropriate, his trial counsel, were ineffective with regard to the meritorious claim. Finally, the Court will return to the ineffective assistance of trial and appellate counsel claim to resolve what remains of those claims.

Procedural Default of Ineffective Assistance of Appellate Counsel Claims

Franklin's direct appeals in the state courts concluded on November 20, 1991, when the Ohio Supreme Court affirmed the Hamilton County Court of Appeals' judgment upholding Franklin's convictions and sentences. *State v. Franklin*, 62 Ohio St. 3d 118, 580 N.E.2d 1 (1991). On January 23, 1992, Franklin filed a "Motion to Recall Mandate and Permit Supplemental Briefing." (Return of Writ, Doc. No. 15, Exhibit N.) There, Franklin claimed that his appellate counsel failed to raise certain meritorious issues, [*71] failed to inform him that he could raise those issues himself by filing a pro se brief in the Court of Appeals and/or the Ohio Supreme Court, and completely rebuffed his attempts to participate in his appeals. *Id.* Franklin also identified ten alleged errors committed at trial that his appellate counsel failed to raise on appeal. On February 20, 1992, the Ohio Supreme Court entered its denial of Franklin's motion, stating simply that the motion was denied and giving no rationale. *State v. Franklin*, Case No. 90-1914, Ohio Supreme Court Docket No. 32 (February 20, 1992).

The month after Franklin filed his Motion to Recall the Mandate and Permit Supplemental Briefing, and one day before it was denied by the Ohio Supreme Court, that same court rendered its decision in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992). *Murnahan* settled in the negative the question whether ineffective assistance of appellate counsel claims can be raised in post-conviction relief proceedings under *Ohio. Rev. Code §* 2953.21, and established for the first time in Ohio some state-wide procedures for raising ineffective assistance of appellate counsel claims. Paragraphs [*72] two and three of the *Murnahan* syllabus set forth that procedure as follows:

> Claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court [of Ohio]

> pursuant to Section 2(B)(2)(a)(iii), Article IV of the Ohio Constitution. . . .
>
> Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court [of Ohio] have expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App.R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the Supreme Court [of Ohio], pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court.

That said, however, the *Murnahan* court observed that

> Since claims of ineffective assistance of appellate counsel may be left undiscovered due to the inadequacy of appellate counsel or the inability of the defendant to identify such errors within the time allotted for reconsideration [*73] in the court of appeals or appeal to this court, it may be necessary for defendants to request delayed consideration. Therefore, in an individual case where a defendant has put forth a colorable claim of ineffective assistance of appellate counsel, where the circumstances render the application of res judicata unjust, and the time periods for reconsideration in courts of appeals and direct appeal to this court have expired, he or she must: (1) apply for delayed reconsideration in the court of appeals where the alleged error took place pursuant to App.R. 26 and 14(B), . . . and if delayed reconsideration is denied, then (2) file for delayed appeal in this court pursuant to Section 8,

> Rule II of the Rules of Practice of the Supreme Court. . . . Before granting reconsideration, the court of appeals should determine whether there are substantive grounds for relief. . . . If the court summarily dismisses the request for reconsideration, it shall state in its entry the reasons for not further reviewing the defendant's request.

Murnahan, 63 Ohio St. 3d at 65-66, 584 N.E.2d at 1209. Thus, after *Murnahan*, there was a state-wide procedure in place in Ohio by which [*74] to raise ineffective assistance of appellate counsel claims, but there was no prescribed time within which to file an application for delayed reconsideration following completion of a defendant's direct appeals. *See Henderson v. Collins*, 101 F. Supp.2d 866, 887 (S.D. Ohio, 1999)(concluding that "neither the *Murnahan* decision nor Ohio App.R. 14(B) set an outer limit or absolute deadline that would have alerted Petitioner to a certain deadline for filing a *Murnahan* Application pursuant to the rule [announced therein].")(vacated in part on other grounds, 262 F.3d 615 (6th Cir. 2001)). Furthermore, in a footnote, the Ohio Supreme Court recognized that adherence to the then-existing appellate rules respecting applications for reconsideration or delayed reconsideration and enlargements of time was unrealistic in the context of ineffective assistance of appellate counsel claims, and recommended that the Rules Advisory Committee consider amendment of the relevant rules to better serve claimants. *Murnahan* at 66 fn. 6.

When *Murnahan* was decided, and up until the day after Franklin filed his Application for Delayed Reconsideration in the [*75] Court of Appeals, Ohio App. Rule 26 read in relevant part as follows:

> Application for reconsideration of any cause or motion submitted on appeal shall be made in

> writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later.

Following *Murnahan*, the Rules Advisory Committee responded to the state supreme court's recommendation, and on July 1, 1993, one day after Franklin filed his Application for Delayed Reconsideration, an amendment to Ohio App. Rule 26 took effect, including, inter alia, the following provision:

> (B)(1) Application for Reopening
>
> A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

On March 3, 1994, the [*76] trial court denied Franklin's application for delayed reconsideration on the ground that it was untimely under the amended version of Ohio App. R. 26. *State v. Franklin*, No. C-890028 (Ohio App. 1st Dist. March 3, 1994)(unreported entry denying Application for Delayed Reconsideration). The court explained in a footnote that the amendment to Ohio App. Rule 26 noted above applied to Franklin's application for delayed reconsideration even though the application was filed prior to the effective date of the amendment by operation of Ohio App. Rule 43(M).[3] *Id.* at 2. That rule

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[3] The trial court's entry references Ohio App. R. 33(M), which was renumbered as Ohio App. R. 43(M) pursuant to a 1997 amendment to the rule.

provides that the amendments to the appellate rules that were effective on July 1, 1993, "govern all . . . further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies."

[*77]

Given the circumstances of this case, therefore, this Court must determine whether Franklin's ineffective assistance of appellate counsel claim was preserved for federal habeas corpus review by way of either his January 23, 1992, motion to recall the mandate, or his June 30, 1993, application for delayed reconsideration. The Court addresses the effect of each in turn.

First, this Court construes Franklin's motion to recall the mandate as an application for reconsideration as it is apparent that Franklin was attempting to assert an ineffective assistance of appellate counsel claim in the motion. As noted above, the Court of Appeals summarily denied Franklin's motion without elaborating on its reason for doing so. Under *Maupin*, supra, this Court's first step in analyzing Respondent's claim of procedural default with regard to Franklin's ineffective assistance of appellate counsel claim is to determine whether Franklin has failed to comply with a state procedural rule applicable to his claim. *Maupin*, 785 F.2d at 138. That question, however, can be put aside in this instance, because even if this Court were to find such a procedural rule applicable to [*78] Franklin's claim, the second *Maupin* requirement, namely that the State had to have relied upon and enforced the state procedural rule, cannot be met. *See Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)(stating that the mere existence of a procedural bar is insufficient; reliance upon it by the state courts is also required). Moreover, when

a state court ruling does not clearly and expressly evidence reliance on procedural default, there is no waiver. *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990)(en banc). Since the Court of Appeals neither clearly nor expressly relied on a state procedural rule in denying Franklin's motion for reconsideration, its denial cannot provide a basis upon which this Court may find the issues contained within the motion to have been procedurally defaulted.

Next, and more to the point of Respondent's arguments, this Court considers whether Franklin's June 30, 1993, Application for Delayed Reconsideration, or more properly, the state courts' denial of that application, constituted procedural default of Franklin's ineffective assistance of appellate counsel claims asserted therein. [*79] As noted above, Franklin presented his ineffective assistance of appellate counsel claims in that document, which the Court of Appeals denied on March 3, 1994, on the ground that it was untimely pursuant to the July 1, 1993, amendment to Ohio App. Rule 26.

While the parties spend considerable space in their submissions to this Court debating the effect of an unreported Hamilton County Court of Appeals decision on procedural default analysis, *see State v. Rone*, 1983 Ohio App. LEXIS 11867, No. C-820640, 1983 WL 5172 (Ohio App. 1st Dist. August 31, 1983)(unreported), that case does not speak to the Court of Appeals' stated ground for denying Franklin's application for delayed reconsideration, namely the timeliness of Franklin's filing of his application. Instead, Rone is a pre-*Murnahan* case in which the First District Court of Appeals stated that claims of ineffective assistance of appellate counsel are not cognizable in post-conviction relief proceedings. Thus, Rone is not particularly relevant to the present issue.

Likewise, the Court of Appeals did not rely on any state rule announced in *Murnahan* when denying Franklin's Application for Delayed Reconsideration on timeliness grounds. [*80] *Murnahan* gave no guidance on the outer limits of what might be considered a reasonable delay in presenting an ineffective assistance of appellate counsel claim in an application for delayed reconsideration. Moreover, the appellate court's entry leaves no room for doubt that the court relied exclusively on Ohio App. Rules 26(B) and 43(M) in denying Franklin the relief he requested in his Application for Delayed Reconsideration.

Thus, the only question remaining for this Court with regard to Respondent's claim of procedural default is whether the Court of Appeals' reliance on Ohio App. Rules 26(B) and 43(M) satisfies the *Maupin* test. If so, Franklin's ineffective assistance of appellate counsel claim has been procedurally defaulted.

The first and second *Maupin* factors require that there be a state procedural rule applicable to the petitioner's claim with which the petitioner failed to comply, and enforcement of the rule by the state courts. *Maupin*, 785 F.2d at 138. The procedural rule applied to Franklin's Application for Delayed Reconsideration was that he show good cause for filing more than ninety days after journalization of the Court of Appeals' affirmance [*81] of his convictions and sentences. Franklin made no attempt in his application to show good cause for not filing within the ninety-day period,[4] and the Court of

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[4] Since the amendment of Ohio App. Rule 26, the Ohio Supreme Court has considered various events as the starting point for the running of the ninety-day period of time specified in the rule. *Compare State v. Mancini*, 71 Ohio St. 3d 286, 1994 Ohio 59, 643 N.E. 2d 541 (Ohio 1994) (holding application to reopen appeal untimely where it was filed more than ninety days following the July 1, 1993, effective

Appeals denied the application relying on both Franklin's failure to file within ninety days of the Court of Appeals' judgment on direct appeal, and his failure to show good cause for the delay in filing. *State v. Franklin*, No. C-890028 (Ohio App. 1st Dist. March 3, 1994)(unreported entry denying Application for Delayed Reconsideration). Thus the first and second requirements of *Maupin* have arguably been met.

[*82]

The third *Maupin* factor requires that the applicable state procedural rule relied upon by the state court be one that is adequate and independent, and thus a sufficient ground upon which to foreclose federal relief. *Maupin*, 785 F.2d at 138. To satisfy the requirement that the state procedural rule be "independent," the rule and the state court's reliance upon it must rely in no part on federal law. *See Coleman v. Thompson*, 501 U.S. 722, 732-33, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). To be "adequate" the state rule must have

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date of amended Ohio App. Rule 26(B)); *State v. Spaulding*, 71 Ohio St. 3d 228, 1994 Ohio 42, 643 N.E.2d 112 (Ohio 1994)(same), with *State v. Erwin*, 71 Ohio St. 3d 290, 1994 Ohio 57, 643 N.E.2d 544 (Ohio 1994)(rejecting application for reopening where defendant failed to show cause for failure to file application within ninety days from journalization of court of appeals' decision affirming conviction); *State v. Cobb*, 71 Ohio St. 3d 289, 643 N.E.2d 543 (Ohio 1994)(same). *See also White v. Schotten*, 201 F.3d 743. 749 (6th Cir. 2000)(noting that Ohio App. Rule 26(B) would have required the petitioner to file his application to reopen his appeal within ninety days of the amendment's effective date where court of appeals affirmed the petitioner's convictions on January 31, 1991).

been firmly established and regularly followed by the state courts by the time the rule was to be applied. *Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991). *See also Rogers v. Howes*, 144 F.3d 990, 991 (6th Cir. 1998). It is this second requirement that is problematic in this case.

The United States Supreme Court, and common sense, dictate that a rule cannot be "firmly established and regularly followed" before it even exists. *See Ford*, 498 U.S. at 423. In Ford, the petitioner had challenged the retroactive application of a newly-announced [*83] state procedural rule limiting the time within which a defendant could challenge exclusion of a juror pursuant to the Supreme Court's then-recent decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In reversing the state court's application of the new rule to Ford's case, the Court reasoned as follows:

> In any given case . . . the sufficiency of [a state procedural] rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458, 78 S. Ct. 1163, 1169-1170, 2 L. Ed. 2d 1488 (1958). In the NAACP case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part of a consistent pattern of procedures," because the defendant in that case could not be "deemed to have been apprised of its existence." *Id.*, at 457[, 78 S. Ct., at 1169]. [*84]

Ford, 498 U.S. at 423. The Court concluded that the new rule had not been announced by the time Ford could have raised his claim in a timely manner, and that it was consequently inadequate to serve as an independent state ground for procedural default purposes. Ford, 498 U.S. at 424. The same is true of the appellate rule relied upon by the state court in denying Franklin's Application for Delayed Reconsideration.

Moreover, the case law existing at the time that Franklin filed his Application for Delayed Reconsideration confused rather than clarified under what circumstances the courts of appeals would consider a delayed application on its merits without a showing of good cause for its being filed late. *See State v. Bradley*, 91 Ohio St. 3d 570, 2001 Ohio 116, 747 N.E.2d 819 (2001)(affirming denial of application to reopen appeal on grounds that appellant failed to raise a genuine issue of ineffective assistance of counsel, where conviction and sentence were affirmed in 1987 and application to reopen appeal was filed in February, 2000); *State v. Benner*, 76 Ohio St. 3d 105, 1996 Ohio 34, 666 N.E.2d 1098 (1996)(dismissing on timeliness grounds [*85] application for delayed reconsideration filed six years after conviction affirmed by court of appeals, more than one year after *Murnahan*, and one day prior to effective date of amended Ohio App. Rule 26); *State v. Greene*, 86 Ohio App. 3d 620, 621 N.E.2d 743 (1993)(noting the court's earlier denial on the merits of defendant's application for delayed reconsideration filed more than four years after conviction was affirmed by the court of appeals and eight months after *Murnahan*); *State v. Bellish*, Mahoning County, 1998 Ohio App. LEXIS 1823, No. 87-CA-78, 1998 WL 158854 (Ohio App. 7th Dist. March 31, 1998)(unreported)(denying on timeliness grounds application for delayed reconsideration filed more than six years after conviction was affirmed by court of appeals, four years after *Murnahan*, and three and one half years after amendment of Ohio App. Rule 26); *State*

v. Owens, Mahoning County, 1996 Ohio App. LEXIS 1224, No. 84-CA-131, 1996 WL 146097 (Ohio App. 7th Dist. March 29, 1996)(unreported) (finding untimely an application for delayed reconsideration filed eight years after conviction affirmed by court of appeals, two years after *Murnahan*, and more than six months after effective date of amended Ohio App. Rule [*86] 26); *State v. Brofford*, 1993 Ohio App. LEXIS 3235, No. 422, 1993 WL 268843 (Ohio App. 4th Dist. June 25, 1993)(unreported)(granting application for delayed reconsideration alleging ineffective assistance of appellate counsel where application was filed ten years after court of appeals' affirmance of conviction and one month after *Murnahan*); *State v. Dennison*, 1993 Ohio App. LEXIS 2864, No. CA91-09-073, 1993 WL 191980 (Ohio App. 12th Dist. June 7, 1993)(unreported)(granting application for delayed reconsideration filed one year after *Murnahan* and ten months after court of appeals affirmed conviction); *State v. Hughes*, No. 1937, 1993 WL 390072 (Ohio App. 4th Dist. May 20, 1993)(unreported)(addressing merits of an ineffective assistance of appellate counsel claim contained within an application for delayed reconsideration filed one year after *Murnahan* and fourteen months after court of appeals affirmance of conviction); *State v. Wilson*, 1993 Ohio App. LEXIS 2282, No. L-84-332, 1993 WL 231720 (Ohio App. 6th Dist. April 22, 1993)(unreported)(addressing the merits of a post-*Murnahan* ineffective assistance of appellate counsel claim nine years after conviction); *State v. Walker*, 1993 Ohio App. LEXIS 1645, No. 92-CA-59, 1993 WL 85416 [*87] (Ohio App. 2nd Dist. March 24, 1993)(unreported)(construing petition for post-conviction relief containing ineffective assistance of appellate counsel claim as an application for delayed reconsideration and addressing merits where petition was filed one month after conviction was affirmed by court of appeals and two months after *Murnahan*); *State v. Amison*, 1993 Ohio App. LEXIS 1782, No. S-91-19, 1993 WL

170971 (Ohio App. 6th Dist. March 22, 1993) (unreported) (granting application for delayed reconsideration filed one year after *Murnahan* and more than three months after conviction affirmed by court). Furthermore, in *Henderson v. Collins*, 101 F. Supp.2d 866, 885 (S.D. Ohio 1999)(Speigel, J.), the court concluded after analyzing *Rone* and *Murnahan* that prior to the July 1, 1993, effective date of amended Ohio App. Rule 26, "there was no viable method of raising a claim of ineffective assistance of appellate counsel where the time for moving to reconsider had already expired." *Cf. Ballew v. Mitchell*, 2001 U.S. Dist. LEXIS 23053, No. C-1-98-867, 2001 WL 242563 (S.D. Ohio March 7, 2001)(Smith, J.)(stating that by 1995, and certainly by 1999, Ohio App. Rule 26(B) had been in effect [*88] for several years and concluding that the rule was, at those times, an adequate and independent state ground that satisfied the third prong of *Maupin*).

This Court is not unaware of the Sixth Circuit Court of Appeals' recent decision in *Coleman v. Mitchell*, 244 F.3d 533, 540 (6th Cir. 2001), wherein the court noted that even before the *Murnahan* decision by the Ohio Supreme Court, *Rone* was the law in the state appellate district where Coleman's case arose, and that *Rone* had established that ineffective assistance of appellate counsel claims were to be raised in a delayed motion for reconsideration rather than a petition for post-conviction relief. The Sixth Circuit's opinion makes it apparent that Coleman's arguments concerning the timeliness of his delayed motion for reconsideration were less than clear, and that Coleman's contention was that the ninety-day filing period contained in Ohio App. Rule 26(B) should have been tolled in his case during the pendency of his post-conviction relief petition, in which he had asserted his ineffective assistance of appellate counsel claims in spite of *Murnahan* and *Rone*. Coleman, 244 F.3d at 540. [*89] Therefore, although the court

suggested in dictum that the amended rule could be retroactively applied to Coleman, that issue was apparently not before the court. To further confuse matters, the court noted that Coleman had filed his delayed motion for reconsideration before the effective date of Ohio App. Rule 26(B) in spite of its acknowledgment that Coleman had filed his motion on July 9, 1993, and that the effective date of the amendment to Ohio App. Rule 26 was July 1, 1993. *Id.* at 539-40. Thus, Coleman provides little guidance to this Court on the issue sub judice.

This Court concludes that Ohio App. Rule 26(B) was not a firmly established and regularly followed state procedural rule when the Court of Appeals' decision affirming Franklin's convictions and sentences was journalized or at the time Franklin filed his Application for Delayed Reconsideration. Consequently, the third *Maupin* requirement has not been met, the claim is not procedurally defaulted, and Franklin's first ground for relief is amenable to a review on its merits by this Court. Moreover, appellate counsel's ineffectiveness, if demonstrated, can fulfill the "cause" requirement [*90] of *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), with regard to the alleged procedural default of Franklin's ineffective assistance of trial counsel and trial court error claims. *See Edwards v. Carpenter*, 529 U.S. 446, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000).

In addition, this Court has recently held as follows:

> At this point in time, it cannot be said that the Ohio App. R. 26(B) timeliness/good cause rule is firmly established and regularly followed in Ohio capital cases. . . . The Ohio Supreme Court appeared to be headed in that direction, but then shifted its course. In every capital case raising the question in 2001, the court failed to affirm a court

of appeals' ruling that a 26(B) application was untimely and instead reached the merits. In none of those cases did it overturn the court of appeals' timeliness ruling, it merely failed to discuss it.

Thus this Court is faced with a state rule which may have been relatively firmly established and followed . . . but is no longer firmly established and followed. It is also not as if the timeliness requirement were being inconsistently enforced, or enforced [*91] in egregiously old cases and not in others. The Ohio Supreme Court has declined to enforce the rule in any capital case in the last year.

Respondent suggests that cases decided after Petitioner's in the Ohio Supreme Court should not be considered. Rather, she argues, the question is whether the rule was firmly established and regularly enforced as of the time when it was applied to Petitioner. If the Ohio Supreme Court had used its rule-making power to amend Rule 26(B) and eliminate the timeliness requirement as of some date in 2001, this result would make sense. The purpose of the adequate and independent state ground rule is comity to the state courts, and it would hardly reflect comity to compel a State to apply an essentially legislative amendment retroactively. But the Ohio Supreme Court has not "changed" the rule in a legislative fashion. Instead, it has declined to enforce the rule and in each instance reviewed the ineffective assistance of counsel claim on the merits.

Moreover, in declining to enforce the rule, the Ohio Supreme Court has not distinguished between capital cases where the convictions are

> quite old and those in which they are more recent. As Petitioner [*92] points out, it would be anomalous indeed to "punish" [him] with denial of merits review because he filed his 26(B) application more promptly than some capital defendants, since those who were more tardy got the benefit of the Ohio Supreme Court's relaxation of the rule.
>
> The Court holds that Ohio App. R. 26(B) is not presently firmly established and regularly followed in Ohio capital cases so as to prevent merits review of [Petitioner's] claims of ineffective assistance of appellate counsel presented to the Ohio courts in his 26(B) application.

Landrum v. Anderson, 185 F. Supp. 2d 868, Decision and Order Granting Petitioner's Motion for Reconsideration (S.D. Ohio, February 4, 2002)(Doc. No. 148).

As noted above, most if not all of the claims underlying Franklin's first ground for relief are asserted as separate grounds for relief further on in his petition. Thus, to the extent that they have been preserved, this Court will consider whether Franklin's claims of defense counsel's ineffectiveness, trial court error, and prosecutorial error are meritorious in their own right and as claims that underlie his ineffective assistance of appellate counsel claims before considering [*93] the merits of Franklin's first ground for relief. In addition, discussion of Franklin's ineffective assistance of trial counsel claim (presented as his second ground for relief) will be postponed until after his other claims are considered, since there is considerable overlap between his underlying claims and his ineffective assistance of trial counsel claim as well.

Third Ground for Relief

In his third ground for relief, Franklin contends the trial court erred in denying his request for an investigator. On September 16, 1988, Franklin's trial counsel filed a motion requesting appointment of an investigator to assist "in the proper representation of the Defendant." (Trial Court Doc. No. 6.) The trial court denied the request without explanation on November 1, 1988. Franklin first raised the trial court's denial of his motion as error in his "Motion to Recall Mandate and Permit Supplemental Briefing," (Return of Writ, Doc. No. 15, Exhibit N at 4), and subsequently raised it as a ground for relief in his state post-conviction petition (Return of Writ, Exhibit W at 8-10), and as his fourth assignment of error in his June 30, 1993, Application for Delayed Reconsideration (Return [*94] of Writ, Doc. No. 15, Exhibit DDD at 41-43). Respondent argues that Franklin's claim has been procedurally defaulted by his failure to raise it as error on direct appeal and the state courts' refusal to consider the claim as raised in Franklin's Motion to Recall the Mandate and his Application for Delayed Reconsideration on state procedural grounds. This Court, however, has found that neither the Ohio Supreme Court's denial of Franklin's Motion to Recall the Mandate nor the Court of Appeals' denial of his Application for Delayed Reconsideration met the requirements of *Maupin* so as to preclude federal review of the claim. Thus, Franklin's ineffective assistance of appellate counsel claims, to the extent that they were raised in his Motion to Recall the Mandate and/or his Application for Delayed Reconsideration, have not been procedurally defaulted. Consequently, no cause and prejudice need be shown with regard to those claims. Concerning the underlying claims of trial court error, ineffective assistance of trial counsel, and prosecutorial misconduct, however, Franklin must still show cause and prejudice for having failed to raise those claims at the appropriate time in the state [*95] courts. *Edwards v. Carpenter*, 529 U.S. 446, 453-54, 120 S. Ct. 1587, 1592, 146

L. Ed. 2d 518 (2000). Because he has preserved his ineffective assistance of appellate counsel claim for habeas review, that claim will satisfy the "cause" requirement, providing the ineffective assistance of appellate counsel claim possesses some merit. *Id.* In evaluating any such merit, and in addressing the prejudice prong of the "cause and prejudice" exception to procedural default, therefore, Court must necessarily consider the merits of the underlying claims.

Franklin's claim that he was entitled to an investigator to assist his trial counsel in preparing for trial rests upon two grounds: (1) he claims entitlement under Ohio Rev. Code § 2929.04 (Anderson 1988) and Ohio Supreme Court Rule 65, III(C) of the Rules of Superintendence for Courts of Common Pleas; and (2) he contends that the Due Process Clause of the Fourteenth Amendment to the United States Constitution includes a right to an investigator, referencing *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). The first of Franklin's grounds for his claim is not [*96] cognizable in habeas corpus, as whatever entitlement to an investigator exists under the Ohio Revised Code and the Rules for Superintendence for [Ohio] Courts of Common Pleas are a matter of state law, and do not independently implicate a federal constitutional right. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)(stating "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions). Thus, the Court need only evaluate Franklin's claim that the Fourteenth Amendment required appointment of an investigator to assist him in preparing for his trial.

In *Ake*, the United States Supreme Court held as follows:

> When a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a

> significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83, 105 S. Ct. at 1096. Shortly after the Court decided *Ake*, it rejected a petitioner's [*97] claim that a state trial court's denial of his request for appointment of a criminal investigator, a fingerprint expert, and a ballistics expert violated the constitution because the petitioner had "offered little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). Thus, the Court observed that there was "no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type . . . sought." *Id.* Consequently, a criminal defendant seeking appointment of an investigator to assist with trial preparation must, at the very least, offer more than "undeveloped assertions that the requested assistance would be beneficial" under Caldwell. Because this Court finds that Franklin has not done so, a discussion on whether *Ake* is applicable beyond its particular factual scenario is unnecessary. *See Weeks v. Angelone*, 176 F.3d 249, 264 (4th Cir. 1999)(noting that "although there was broad language in *Ake* suggesting application to a variety of circumstances in [*98] which an indigent defendant requests expert assistance, its precise holding was limited to the facts at hand"); *Moore v. Kemp*, 809 F.2d 702, 711-12 (11th Cir. 1987)(suggesting that Caldwell casts suspicion on whether *Ake* applies to requests for non-psychiatric experts); *Mason v. Mitchell*, 95 F. Supp.2d 744, 774 (N.D. Ohio 2000)(citing three federal cases purportedly construing *Ake* generally to require the state to provide an indigent defendant with any

expert services that are necessary to present an adequate defense).

Franklin's motion for appointment of an investigator was filed on September 16, 1988, and stated, in its entirety, as follows:

> Now comes the Defendant, George T. Franklin, by and through his undersigned counsel, and hereby states that he is indigent and does so move the Court to appoint investigative services, experts and any other such services as are reasonably necessary to assist in the proper representation of the Defendant in the above captioned cause. Furthermore, Defendant moves the Court that the payment of fees and expenses for said services be paid at public expense.

(Trial Court Docket No. 6.) [*99] The trial court summarily denied the motion on November 2, 1988. (Trial Court Docket No. 49.) Franklin renewed his motion in a November 17, 1988, hearing on all pending motions, claiming that the investigator was needed to contact or "track down" and interview witnesses. (Transcript of November 17, 1988, Hearing at 12.) Even cumulatively, Franklin's assertions in his motion and arguments at the November hearing do not amount to anything more than "undeveloped assertions that the requested assistance would be beneficial." *Caldwell*, 472 U.S. at 323-24 n.1. Although Franklin has since expanded his argument to, if not greater substance, then at least greater length in subsequent filings in the state courts and in this Court, the reasonableness of the trial judge's action must be viewed in the context of the time at which it was taken. Moore, 809 F.2d at 710; *see also Ake*, 470 U.S. at 86 (evaluating the reasonableness of the trial court's denial of a psychiatric expert on information available to the trial court at the time the decision was made). Thus, Franklin's

expanded post-trial arguments are of little use to this Court's analysis, [*100] especially when he makes no claim that he was somehow prevented from making those same arguments to the trial court when the court was considering his motion for investigative services.

When viewing the trial court's denial of Franklin's motion for appointment of an investigator in light of the information available to the court at the time the motion was presented, this Court finds no error warranting habeas relief. Franklin does not contend his trial counsel ineffectively presented their written and oral arguments in support of their motion for investigative service, and he argues his appellate counsel's ineffectiveness on this point only insofar as they did not raise the trial court's denial of an investigator as error on direct appeal. As the Court finds no error by the trial court, appellate counsel cannot be faulted for their failure to raise as error a meritless claim. In a circular fashion then, it goes without saying that the alleged ineffectiveness of Franklin's appellate counsel cannot serve as "cause" for his having failed to raise as error on direct appeal the trial court's denial of an investigator.

This Court recommends that Franklin's request for habeas corpus relief [*101] on his third ground for relief be denied. To the extent that his ineffective assistance of appellate counsel claim relies on his third ground for relief, it should also be denied.

Fourth Ground for Relief

In his fourth ground for relief, Franklin claims he was denied the procedural safeguard of a meaningful, independent review by the trial court of the jury's recommendation that he be sentenced to death. Respondent relies upon the post-conviction trial court's determination that this claim for relief could have been but was not raised on direct appeal and is consequently procedurally defaulted.

The instant ground for relief was first raised by Franklin in the state court in his January 23, 1992, Motion to Recall the Mandate and Permit Supplemental Briefing, wherein he claimed the trial court erred in its review of his death sentence and that his appellate counsel were ineffective for their failure to raise the trial court's error as an assignment of error on direct appeal. (Return of Writ, Doc. No. 15, Exhibit N.) As noted above, the state court's rejection of Franklin's Motion to Recall the Mandate and Permit Supplemental Briefing did not rest on independent and adequate [*102] state grounds, and is therefore not a basis for finding procedural default. Franklin next raised the issue presented in his fourth ground for relief as his thirty-sixth claim in his petition for post-conviction relief. (Return of Writ, Exhibit W.) The trial court rejected the claim, finding it barred by the doctrine of res judicata for Franklin's failure to raise the issue on direct appeal. (Return of Writ, Exhibit DD.) Neither the state court of appeals nor the Ohio Supreme Court disturbed the trial court's judgment on appeal. Finally, Franklin raised the issue again in his Application for Delayed Reconsideration. (Return of Writ, Exhibit DDD.) Again, Franklin claimed his appellate counsel were ineffective for failing to raise as error on direct appeal the infirmities in the trial court's review of the jury's recommendation that he be sentenced to death. As noted above, the state court's rejection of Franklin's Application for Delayed Reconsideration did not rest on independent and adequate state grounds. Consequently, Franklin has not procedurally defaulted on the instant claim, and this Court is free to address the merits.

Under the law of Ohio at the time of Franklin's trial, [*103] the criteria for imposing the death sentence included the following statutory aggravating circumstances:

(1) The offense was the assassination of the president of the United States or [certain other public officials or candidates for public office];

(2) The offense was committed for hire;

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender;

(4) The offense was committed while the offender was a prisoner in an detention facility . . .;

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was a part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;

(6) The victim of the offense was a peace officer . . . whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offens , was engaged in his duties, or it was the offender's specific purpose to kill a peace officer;

(7) The offense was committed [*104] while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design; and

> (8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

Ohio Rev. Code § 2929.04(A)(Anderson 1987). If one or more of the statutory aggravating circumstances are found by the jury to have been proved beyond a reasonable doubt, the jury must then weigh any mitigating evidence against the aggravating circumstances [*105] to determine whether death is the appropriate sentence in a given case. Ohio Rev. Code § 2929.03(D)(2)(Anderson, 1987). The mitigating factors consist of the following:

> (1) The nature and circumstances of the offense;
>
> (2) The history, character, and background of the offender;
>
> (3) Whether the victim of the offense induced or facilitated it;
>
> (4) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
>
> (5) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(6) The youth of the offender;

(7) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(8) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(9) Any other [*106] factors that are relevant to the issue of whether the offender should be sentenced to death.

Ohio Rev. Code § 2929.04(B)(Anderson 1987).

Before adopting the jury's recommendation of death, the trial court must conduct an independent weighing of the aggravating circumstances and mitigating factors as well. *Ohio Rev. Code* § 2929.03(D)(3) (Anderson, 1987). It is here that Franklin claims the trial court committed error of a constitutional dimension.

The Court approaches Franklin's claim fully aware that the States enjoy wide freedom to structure and shape the parameters of the consideration of mitigating evidence. *See Boyde v. California*, 494 U.S. 370, 376, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *see also Walton v. Arizona*, 497 U.S. 639, 652, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). In addition, it bears repeating that a violation of a state statute is not per se a violation of a petitioner's federal constitutional rights. *Barclay v. Florida*, 463 U.S. 939, 957, 103 S. Ct. 3418, 3429, 77 L. Ed. 2d 1134 (1983)(plurality opinion); *Gryger v. Burke*, 334 U.S. 728, 731, 68 S. Ct. 1256, 1257, 92 L. Ed. 1683 (1948). [*107]

Franklin contends that the trial court (1) impermissibly weighed the nature and circumstances of the offense as an

aggravating circumstance, (2) improperly and prejudicially referred to "aggravating circumstances" when only one aggravating circumstance existed, and (3) failed to consider and give effect to the mitigating evidence. It is true that the trial court appears to have weighed the nature and circumstances of Franklin's offense as an aggravating circumstance, and that it apparently used the terms "aggravating circumstances" and "aggravating circumstance" interchangeably in its sentencing opinion. (Return of Writ, Doc. No. 15, Exhibit A.) Under the heading "Aggravating Circumstance," in fact, the trial court described Gerald Strauss' murder, including reference to Strauss' impending marriage prior to his death and that he suffered multiple skull fractures with skull fragments being driven into his brain, causing extensive damage and excessive bleeding. *Id.* at 2. Although the trial court later acknowledged that the nature and circumstances of the offense are identified as mitigating factors under Ohio law, it also concluded that "what was presented in mitigation pales in [*108] the face of the savage and senseless circumstances of this case." *Id.* at 3-4. In addition, the trial court referred to the "aggravating circumstances" in Franklin's case on two occasions in its sentencing opinion.

This Court agrees with Franklin that the trial court erred in weighing the nature and circumstances of the offense against the mitigating factors rather than as one of the mitigating factors. The inquiry does not end there, however, because it is constitutionally permissible for such an error to be cured via an independent reweighing of the aggravating circumstance against the mitigating factors by the state courts on direct appeal. *Clemons v. Mississippi*, 494 U.S. 738, 745, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

Whenever a sentence of death is imposed by a trial court in Ohio, an independent reweighing of the aggravating circumstances and mitigating factors by the state court of

appeals and the state supreme court is mandated by statute. Ohio Rev. Code § 2929.05(A).[5] In its reweighing of the aggravating circumstance against the mitigating factors in Franklin's case, the Court of Appeals consistently referenced a single [*109] aggravating circumstance. *State v. Franklin*, 1990 Ohio App. LEXIS 3385, No. C-890028, 1990 WL 117140 (Ohio App. 1st Dist. August 15, 1990). The Court did, however, state that the mitigatory value of Franklin's youth (he was twenty-two when Gerald Strauss was murdered) was "negligible in comparison to the horrible circumstance of the murder of which he stands convicted." 1990 Ohio App. LEXIS 3385, [WL] at *11. It is not at all clear, however, whether the reference to "the horrible circumstance of the murder" related to the "nature and circumstances of the offense," or whether it was merely an acknowledgment of the already-established aggravating circumstance found by the trial jury to have been proved beyond a reasonable doubt. Regardless, the Ohio Supreme Court pointedly and unequivocally found that "nothing in the nature and circumstances of [Franklin's] offense appears to be mitigating." *State v. Franklin*, 62 Ohio St. 3d 118, 129, 580 N.E.2d 1 (1991). In addition, the Ohio Supreme Court at all times referred to a single aggravating circumstance as it conducted its review of Franklin's death sentence. *Id.* at 129-30. Thus, this Court concludes that any error committed by the trial [*110] court in considering the nature and circumstances of Franklin's offense as aggravating rather than mitigating was cured by the independent reweighing of the aggravating circumstances and mitigating factors by the state court of appeals and Ohio Supreme Court.

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[5] Direct appeal at the state court of appeals level has been eliminated for death penalty cases in Ohio since Franklin's convictions and appeals.

A similar result obtains with regard to Franklin's contention that the trial court did not consider and give effect to the mitigating evidence presented during the penalty phase of his trial. Franklin bases his contention on the trial court's statement that "it was 'not persuaded that there [were] any mitigating factors in this case save possibly the defendant's youth.'" (Amended Petition, Doc. No. 25 at 90.) Franklin's argument is misleading at best. What the trial court actually said in its opinion was that "after careful consideration of everything presented [in mitigation], the Court is not persuaded [*111] that there are any mitigating factors in this case save possibly the defendant's youth." (Return of Writ, Doc. No. 15, Exhibit A at A-8.)(Emphasis added.) Furthermore, the trial court made its conclusion after detailing the testimony of Franklin's mitigation witnesses. Franklin's argument ignores the trial court's consideration of the mitigating evidence presented at trial. The Court consequently finds Franklin's claim unsupported by the record.

Franklin's fourth ground for relief should be denied, and, to the extent that his ineffective assistance of appellate counsel relies on this ground for relief as an underlying claim, his first ground for relief should also be denied.

Fifth Ground for Relief

In his fifth ground for relief, Franklin claims two prospective jurors were unconstitutionally excused on account of their race. Respondent argues that the claim has been procedurally defaulted.

Franklin first raised this ground for relief in his Motion to Recall the Mandate and Permit Supplemental Briefing. (Return of Writ, Doc. No. 15, Exhibit N.) As noted above, the state court's denial of Franklin's motion did not rest on independent and adequate state grounds under [*112] *Maupin* and the state court's disposal of the motion

consequently cannot form the basis for a finding in this court that Franklin has procedurally defaulted his claim. Franklin again pressed the instant claim as his ninth ground for relief in his petition for post-conviction relief. (Return of Writ, Doc. No. 15, Exhibit W.) The trial court found the claim barred by the doctrine of res judicata. (Return of Writ, Doc. No. 15, Exhibit DD.) In his Application for Delayed Reconsideration, Franklin raised the issue again in conjunction with an ineffective assistance of appellate counsel claim. (Return of Writ, Doc. No. 15, Exhibit DDD.) Again, this Court has determined that the state court's dismissal of Franklin's Application for Delayed Reconsideration was not based upon an adequate and independent state ground under *Maupin*. Consequently, this ground for relief has not been procedurally defaulted, and is amenable to a merits review in this Court.

During voir dire, the State used peremptory strikes to exclude prospective jurors Colston and Fowler from the venire. Both Colston and Fowler are African-American, as is Franklin. Counsel for the defense challenged the strikes as discriminatory, [*113] and the judge requested explanations for the strikes from the prosecutor. As for prospective juror Colston, the prosecutor explained that Colston had acknowledged potential employment or financial problems that could distract him. In addition, Colston had been exposed to the case through the media, knew a police officer that had worked on the case, and had what the prosecutor considered "an unusual desire" to serve on the jury. (Trial Tr. at 442-460, 658.) The prosecutor stated he had challenged prospective juror Fowler because she worked in the kitchen of a synagogue and may have been treated badly there, which could cause her to be less sympathetic to the victim, who was Jewish. (Trial Tr. at 506-521, 661.) In addition, Fowler had indicated she felt sorry for Franklin. *Id.* at 519. The trial court accepted the prosecutor's explanations and Colston and

Fowler were excused. Franklin claims that the stated reasons for the exclusions of prospective jurors Colston and Fowler were mere pretext concealing unconstitutional discriminatory motives. Franklin implicitly claims that it was error for the trial judge to uphold the strikes, thus making a tacit finding of no discrimination. [*114]

The Sixth Circuit Court of Appeals recently and succinctly summarized the law pertinent to Franklin's claim, writing as follows:

> It is settled that the Constitution's guarantee of equal protection ensures that a party may not exercise a peremptory challenge to remove an individual on account of that person's race. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) . . . . To establish a [sic] equal protection violation under *Batson*, the claimant must first establish a prima facie case of racial discrimination. *See United States v. Mahan*, 190 F.3d 416, 424 (6th Cir. 1999). If the claimant establishes a prima facie case, the party exercising the peremptory must proffer a race-neutral explanation. *See id.* This non-racial explanation "need not be particularly persuasive, or even plausible, so long as it is neutral." *United States v. Harris*, 192 F.3d 580, 586 (6th Cir. 1999). After the defending party offers its race-neutral justification the challenging party must demonstrate that the purported explanation is merely a pretext for a racial motivation. *See id.* As with discrimination [*115] claims generally, the ultimate burden of persuasion always rests with the party challenging the peremptory. *See Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995).

McCurdy v. Montgomery County, 240 F.3d 512, 521 (6th Cir. 2001). It bears repeating at this juncture that in federal habeas review of a state conviction, 28 U.S.C. § 2254(d) requires the federal courts to accord state-court factual findings a presumption of correctness. In the absence of exceptional circumstances, therefore, a federal court will defer to state-court factual findings even when they relate to a federal constitutional issue. *Hernandez v. New York*, 500 U.S. 352, 366, 111 S. Ct. 1859, 1870, 114 L. Ed. 2d 395 (1991). The Supreme Court has also observed that deference to trial court findings on the believability of counsel's race-neutral explanation for a peremptory challenge makes particular sense because "as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility,'" *Hernandez*, 500 U.S. at 365, quoting *Batson*, 476 U.S. at 98, n.21, and once [*116] the credibility of counsel's explanation has been settled, there seems nothing left to review, *Hernandez*, 500 U.S. at 367. In light of the great deference given a trial court's decision in a *Batson* challenge, this Court considers Franklin's claim under a "clearly erroneous" standard of review. *Id.* at 365-66.

In the instant case, Franklin argues that the reasons cited by the State as bases for the peremptory strike of Colston were pretextual. In support of this allegation, Franklin submits that Colston asserted he would be able to hear the case impartially and that his employment situation would not affect his performance as a juror. (Trial Tr. at 447.) Colston claimed that his acquaintance with the police officer was a distant one, and that he would not give special credence to police testimony if selected as a juror. *Id.* at 452. Regarding media exposure, three of the jurors selected also admitted to having foreknowledge of the case. Indeed, each of these three objections (employment conflict, contact with law enforcement, and exposure) could also have applied to prospective juror Bostic, and two other prospective jurors,

Sikorski [*117] and Bergh, each could have been the subject of two of the purported causes for exclusion. Yet these individuals were not challenged. As for the claim that Colston appeared too eager to sit on the jury, Franklin asserts that it is duplicitous for the State to object on these grounds given its own, and the trial court's, laudatory remarks on the privilege of jury service. Franklin concludes from these facts that the stated reasons for the prosecutor's peremptory challenge of Colston were fictitious, a mere pretext concealing racial motives.

Regarding Colston's affirmations of impartiality, both with respect to his employment situation and his acquaintance with the police officer, the rehabilitation of the prospective juror is not paramount in this Court's inquiry. The Supreme Court was explicit in stating that a *Batson* explanation need not rise to the level of removal for cause, but that is precisely the result here if simple affirmations of impartiality were sufficient to defeat the State's reasons for using its peremptory strike to excuse Colston from the jury. *See Batson*, 476 U.S. at 97. A prosecutor exercising a peremptory challenge may believe or disbelieve [*118] such affirmations from a prospective juror at his or her discretion, and may legitimately evaluate the juror on that basis. It is the responsibility of the trial court to evaluate the prosecutor's sincerity in asserting concern about bias as a basis for a peremptory strike. Affirmations of impartiality by the prospective juror may be a part of that evaluation, but their mere existence does not compel a conclusion that a lingering fear of bias is unfounded or illegitimate.

Franklin also submits that some of the stated objections to Colston also could have been applied to other prospective jurors but were not. Specifically:

> (1) Juror Bostic admitted to having an employment conflict, to knowing some police

> officers, and to having been exposed to Franklin's case through the media;
>
> (2) Juror Sikorski admitted to the possibility of employment distractions, and to media exposure, and;
>
> (3) Juror Bergh stated that he had been exposed to the case at Procter & Gamble where he and the decedent worked in different divisions of the advertising department, and that his brother-in-law was a police officer.

(Trial Tr. at 426-42, 482-506, 578-95.) Franklin contends that because [*119] these similarly situated jurors were not challenged, the peremptory challenge of Colston must have been racially motivated.

Certainly the presence of similarly situated but unchallenged jurors bears directly on the credibility of the proffered explanation for a prosecutor's peremptory challenge. There may even be instances where the similarities between prospective jurors are of such an encompassing and conspicuous nature that no reasonable person could credit an explanation purporting to distinguish between them. Such, however is not the case here.

The question presented by Franklin's allegation is whether a party could credibly claim that, with regard to the stated reasons, it found relevant distinctions between Colston and the jurors named. If such distinctions exist, then the inquiry once again becomes one of credibility assessment by the trial court. Although the cursory explanations given by the prosecutor create the appearance of similarity of circumstance between Colston and the others, examination of the details suggest more significant differences.

Franklin points out that jurors Bostic and Bergh both knew police officers, as did Colston. Bergh's contact with

law enforcement, [*120] however, was through a brother-in-law who was a police officer in Vermont. It is not at all unreasonable to infer that this relationship differed in quality from the past friendship between Colston and a local police officer. Juror Bostic also acknowledged having several police officers as acquaintances, but Colston's acquaintance was with an officer who had worked on the Franklin case, the very case on which Colston, if selected, would be serving as a juror. (Trial Tr. at 445.) Moreover, Colston's police officer friend was listed as a potential witness in Franklin's case. *Id.*

Both Colston and Sikorski admitted to the possibility of distraction during the trial due to their respective employment situations. While Colston stated he might be distracted by his employment responsibilities, Sikorski was unemployed and said his search for a job might be a distraction for him. Although both potential jurors acknowledged the possibility of employment-related distractions, the two situations are sufficiently different that a reasonable person could have drawn different inferences from them. Again, the issue on review is whether the situations were so similar that a claim implying a relevant [*121] distinction between them simply cannot be credited.

Similarly, both Colston and Bergh admitted to having been exposed to the case prior to the proceedings. Colston had heard about the case through the media, and he worked as a firefighter at a station that may have responded to the scene of Gerald Strauss' murder. Bergh worked in advertising art at Procter & Gamble in Cincinnati, as did Gerald Strauss prior to his death. Although Bergh did not know Strauss, he had been exposed to rumors about the case that had run "rampant" through the office. Again, both prospective jurors were exposed to the case, but the nature and quality of the exposure differed. It is not difficult to imagine how one who was exposed through the media could form opinions about a case different from those formed by

one who was subjected to rumors propagated by friends and co-workers of the victim. While one could speculate on which of the prospective jurors would be more impartial, it is not critical to the instant inquiry. The proponent of a peremptory challenge is not under a burden to establish that he was motivated only by concerns about impartiality. Rather, he need only establish that he was not motivated [*122] by race. *Purkett*, 514 U.S. at 768; *Hernandez*, 500 U.S. at 360. Of course, if it appears that the excused juror would have been more partial to the proponent of the strike than others not stricken without considering race, then that fact may well bear upon the assessment of credibility. No such contradiction is apparent here, however, and the two situations were sufficiently different to render distinctions between them credible.

Implicit in Franklin's argument is the contention that it is the aggregate of similarities that justifies his assertion that the State's explanations could not have been other than pretext. Just as the broader similarities of situation are compounded, however, so too are the differences. All that needs to be present is some minimum level of discrepancy that could conceivably lead one to suspect that one juror might decide differently than another. As the myriad minor differences between any two prospective jurors are tallied, the possibility of this minimum level being reached is only increased. However similar two potential jurors may be on the whole does not matter if the proponent of a challenge can credibly point to some [*123] fact or set of facts, aside from race, in support of his estimation that one juror is less desirable than the other.

Finally, Franklin asserts that tne State could not validly claim that Colston was too eager to be on the jury after the court, as well as both parties, had extolled the virtues of jury service. While the argument possesses a certain intuitive appeal, it is ultimately unpersuasive. No doctrine of laudatory

estoppel governs here. It is common understanding that a large segment of the population views jury service as an onerous obligation. This understanding very likely motivated, at least in part, the praise directed toward service. Given this understanding, it need not be inconsistent to heap acclaim upon those who undertake jury service, and yet still be disconcerted at the unexpected eagerness of a potential juror. Further, in its explanation, the State did not simply allude to a subjective intuition or impression of Colston's demeanor, but rather inferred the "unusual desire" from facts on the record. The State explained that Colston appeared to be troubled about jury service during the group examination, but later, when questioned individually, he disavowed having [*124] any problems with service. The State suggested that this perceived reversal of Colston's willingness to be on the jury was one of the reasons it decided to exercise one of its peremptory challenges against him.

Franklin attacks the explanation for the exclusion of prospective juror Colston on several grounds, but is unsuccessful in each individually and cumulatively. The explanation was race-neutral and nothing inherent in the explanation itself or in the record compels this court to discredit the trial court's finding of it as such. The trial court acted reasonably and within its discretion in finding that Franklin had not carried his burden of proof under *Batson* and its progeny. Consequently, this Court finds no clear error in the trial court's decision to allow the prosecutor's peremptory challenge to prospective juror Colston.

The Court next considers Franklin's claim as it relates to prospective juror Fowler. Following the State's peremptory challenge with regard to Fowler, defense counsel objected, claiming the State's challenge was race based. In response, the prosecutor explained that the reasons he had challenged Fowler were (1) she had stated she felt sorry for Franklin, [*125] and (2) she had worked in the kitchen of

synagogues and may have been treated badly by Jewish people. The prosecutor suggested that if that were the case, Fowler might possess less sympathy for the victim, Gerald Strauss, who was also Jewish. Franklin argues that the asserted reasons for challenging Fowler were illusory and that the real reason Fowler was challenged was because she is African-American, as is Franklin. Franklin points out that Fowler also stated she felt sorry for Gerald Strauss, and that one of the State's own witnesses also worked at the Jewish Orthodox Home residential facility. Moreover, Fowler stated that she could follow the law as instructed and sign a death verdict if necessary. Franklin claims that these facts establish the State's purported reasons as fictitious, and that the trial court erred in overruling Franklin's *Batson* claim concerning Fowler.

The State claimed it excluded Fowler in part because she expressed sympathy for Franklin. Franklin notes that Fowler also indicated she felt sorry for the victim of Franklin's crime. No conclusion as to the validity of the State's asserted reason for challenging Fowler can be drawn from these facts alone, [*126] however. Parity of sympathy, even if accepted at face value, is not an assurance of impartiality, nor do the opposing sympathies operate to cancel out one another. A juror is not asked to decide the fate of the victim, but rather the accused, and it was Fowler's sympathy for the accused that the State claims motivated its peremptory challenge of Fowler. It is not surprising that the State should be disturbed that a prospective juror feels sorry for the defendant in a criminal proceeding, even when it is accompanied by the more common sympathy for the victim. It may be that the State cannot reasonably hope for a jury devoid of sympathy for the defense, but where a juror has volunteered such a sentiment, it is easy to understand the State's concern.

This analysis, however, is not dispositive as to whether the reason cited by the prosecutor for challenging Fowler was the actual motive. Indeed, reasonable explanations can be pretext and implausible reasons genuine motives. The reasonableness or plausibility of the explanation, however, refutes the claim that the trial court should not have found it credible.

Also proffered as a reason for the peremptory challenge of Fowler was the possibility [*127] of lingering resentment towards Jewish people. Fowler had worked in the kitchen of a synagogue and the prosecutor speculated that she may have been treated badly there. Gerald Strauss was Jewish and the prosecutor was concerned that a lack of sympathy for him or his family could adversely affect the case, at least from the prosecutor's perspective. Franklin, however, contends that because the State relied on testimony from a witness, Michael Turnbolt, who worked at the Jewish Orthodox Home, then the explanation given for challenging Fowler must be false.

It is difficult enough to establish the insincerity of a *Batson* explanation based upon the existence of similarly situated but unchallenged jurors. Making such comparisons between similarly situated jurors and witnesses is dramatically more problematic. The roles that jurors and witnesses play in a trial are, of course, very different. A party could conceivably and without contradiction favor as a witness an individual they would oppose as a juror because of these different roles. A witness' value is primarily determined by the information in his or her possession. Very often a witness will have information so valuable to a party's [*128] case that it would overwhelm considerations of perceived prejudice or animosity. Furthermore, a witness is subject to cross-examination where any bias may be brought out for the jury's consideration in determining the relative weight to give the witness' testimony. In considering a juror,

however, possible predispositions and prejudices are at the core of the analysis. A witness is not asked to decide the case as is a juror.

A more interesting objection to the prosecutor's explanation is that it fails on its face to be non-discriminatory. The rule of *Batson* was created to prevent the peremptory strikes on the assumption that a juror would be racially biased because of the juror's race. *Batson*, 476 U.S. at 97. Here, a juror was excluded because of concern that she held a bias against members of another ethnic or religious group. Such concerns are valid, and peremptory strikes based upon them well founded, provided only that they are not predicated upon the juror's race. The present question, then, is whether the State's explanation of the peremptory strike of Fowler contained an assumption about Fowler's race.

The prosecutor's explanation for the exclusion of [*129] prospective juror Fowler takes the following form:

> 1. Fowler worked for Jewish people in a service position;
>
> 2. Fowler may have been treated badly in the course of that employment;
>
> 3. Fowler may have developed a prejudice against Jewish people because of her experiences;
>
> 4. The victim and his family were Jewish;
>
> 5. Fowler's possible prejudice could affect her judgment on the jury.

Consequently, the prosecutor used a peremptory challenge to remove Fowler from the jury. The question, then, is whether there exists in the above argument an undisclosed premise that depends upon Fowler's race; more specifically, is there an implied premise that Fowler is African-American between Steps Two and Three above.

African-Americans, of course, are no more or less likely to form prejudices than any other group, and there is nothing in the process of generalization from bad experiences that depends upon race. Most allegations of ethnic bias, however, depend implicitly on the premise that the holder of the bias is not of the same group. The explanation above would seem even more tenuous, and likely would not have been made, if, for instance, Fowler was Jewish. Of [*130] course, it would seem strange to assert that Fowler was excluded not because she was African-American, but instead because she wasn't Jewish. The distinction becomes less clear, however, if instead of Jewish people, it had been white people generally that she was feared to be prejudiced against. If it is a prerequisite to racial bias that one not be of the group biased against, then under this hypothetical, the above argument would depend on the premise that Fowler was not white. It seems clear that an argument containing such a premise would fall afoul of *Batson*, and it is not at all clear how it should matter that she was excluded for non-membership in another cognizable minority, rather than the majority. In either case, she is discriminated against on account of race, specifically, on the basis of non-membership within a chosen racial group.

In any allegation of racial or ethnic bias the race of the purported racist is relevant to some degree, for the reasons stated above. Of course, where there is clear and convincing evidence of bias, independent of race, then the race or ethnicity of the purported holder of bias is of minimal importance. Where there is substantial, or even [*131] minimally significant, evidence of bias, the race of the individual becomes more significant. Where there is no real evidence, but only speculation, then the race of the accused racist looms large by comparison, and the likelihood that the allegation depend on race grows proportionately.

It is not the case, however, that non-membership in a group is a strict prerequisite to prejudice against that group. Prejudice is inherently irrational, and no law of belief formation absolutely prohibits the formation of negative stereotypes regarding one's own group. It is possible, therefore, that the State did not implicitly rely on assumptions about Fowler's race when it claimed that she could have been biased. Therefore it is not strictly necessary that the above argument depends upon Fowler's race.

This flexibility is desirable from a policy standpoint. Without it, any allegation of racial bias based upon less than clear and convincing evidence would be vulnerable to a counterclaim of discrimination. Racially biased juries are a threat to justice, and a certain zeal in keeping the jury box free from prejudice is warranted.

The State's explanation for the peremptory strike of Fowler was highly [*132] speculative. This fact, in itself, is not fatal. *Purkett*, 514 U.S. at 768. Because the explanation does not explicitly or necessarily rely on assumptions of race, it passes the second stage of the *Batson* analysis. The trial court, in allowing the strike, implicitly held that Franklin did not carry his burden of proving purposeful discrimination. By failing to rule explicitly, or to make the basis for its decision known, it is impossible to know whether the court considered the potential for the kind of rarified discrimination described above. It may be that the trial court considered the question, but found that the allegation of racial bias did not depend in any way on Fowler's race. It may be that the trial court apprehended that the explanation did rely on Fowler's race, but then decided that this reliance did not constitute discrimination cognizable by *Batson* or the Constitution. It may be that the court never considered the issue, which would not be surprising given its subtlety and the brief instant the court had to consider the matter, but that it still would have reached one of these conclusions if it had. Still,

the possibility remains that this insidious [*133] form of discrimination escaped detection by the trial court.

It is confusion of this kind that has led some circuit courts to impose requirements of explicitness on district courts deciding *Batson* questions. *McCurdy v. Montgomery Co.*, 240 F.3d 512, 521 (6th Cir. 2001)(criticizing the district court's failure to "conform to the requirement that [it] make express findings on each of the elements of a *Batson* claim); *Barnes v. Anderson,* 202 F.3d 150, 156-57 (2d Cir. 1999)(holding it was error for the trial court to deny a Batson motion without explicitly adjudicating the credibility of the non-moving or challenging party's race-neutral explanations for its action in peremptorily striking potential jurors); *United States v. Perez*, 35 F.3d 632, 636 (1st Cir. 1994)(suggesting that district courts should articulate on the record the bases of their factual findings related to Batson). Where *Batson* findings are made explicitly and on the record, troubling uncertainties such as those raised here are less likely and review can be conducted with greater confidence.

The rule of *McCurdy*, however, is directed only to the [*134] district courts, and the United States Supreme Court has imposed no analogous requirement on state courts. Ultimately, the determination of purposeful discrimination is one of historical fact entitled to a presumption of correctness. 28 U.S.C. § 2254(d) (West 1994); *Batson*, 476 U.S. at 98 n. 21; *Hernandez*, 500 U.S. at 364. Franklin has not established nor does it otherwise appear that any of the eight circumstances that negate the presumption of correctness are applicable to his *Batson* claims. *See* 28 U.S.C. § 2254(d)(1)-(8)(West 1994). Although the trial court did not make explicit its reasoning, it was unquestionably in the best position to adjudicate the matter, being privy to the actions and demeanor of both Fowler and the prosecutor. While it may be disconcerting to simply accept that the decision was made correctly with so little information, neither is it clear

that the finding was unreasonable. That the trial court could have credited the State's explanation as genuine and race neutral, together with the presumption of correctness afforded such findings, compel the result that it was not [*135] clear error for the trial court to allow the prosecutor's use of a peremptory challenge against Fowler.

In sum, the explanations given by the prosecutor for the peremptory strikes of prospective jurors Colston and Fowler may not have been particularly satisfying, but they were racially neutral on their face. While there is little in the record to render the explanations plausible or convincing, neither is there anything that requires the conclusion that the trial court was wrong to believe that they were genuinely made.

Franklin's fifth ground for relief should be denied. Consequently, this ground for relief fails as an underlying claim to support Franklin's ineffective assistance of appellate counsel claim in his first ground for relief. To that extent then, Franklin's first ground for relief should also be denied.

Sixth Ground for Relief

In his sixth ground for relief, Franklin claims a violation of his Sixth and Fourteenth Amendment rights to a fair and impartial jury and due process resulted from the service of Juror Arthur on his jury. He argues that during voir dire and at the jury view, Juror Arthur consistently and repeatedly espoused her belief that Franklin [*136] should testify and prove his innocence in spite of the trial judge's admonitions that defendants are presumed innocent and are not required to prove anything at trial.

Respondent contends this ground for relief has been procedurally defaulted. As with the preceding ground for relief, Franklin raised the issue of Juror Arthur's alleged bias in his Motion to Recall the Mandate and Permit

Supplemental Briefing, his petition for post-conviction relief, and in his Application for Delayed Reconsideration. In his Motion to Recall the Mandate and Permit Supplemental Briefing and his Application for Delayed Reconsideration, the claim was accompanied by an ineffective assistance of appellate counsel claim. For the reasons already discussed above, the state courts' dispositions of Franklin's motion and application are insufficient bases upon which to conclude that Franklin procedurally defaulted this ground for relief. Thus, this Court must consider the claim on the merits.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to an impartial jury. *See Morgan v. Illinois*, 504 U.S. 719, 727-28, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). [*137] The principal way a defendant's right to an impartial jury is implemented is through the system of challenges exercised during the voir dire of prospective jurors. *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001). Voir dire is particularly resistant to review, however, because the trial judge's determination as to a prospective juror's impartiality rests heavily on the judge's own evaluations of demeanor evidence and of responses to questions. *Id.*, citing *Mu'Min v. Virginia*, 500 U.S. 415, 423, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991); *Ham v. South Carolina*, 409 U.S. 524, 528, 93 S. Ct. 848, 35 L. Ed. 2d 46 (1973).

The key question in determining whether a trial court erred in denying a challenge based upon a potential juror's impartiality is "did a juror swear that he could set aside any opinion that he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed?" *Patton v. Yount*, 467 U.S. 1025, 1036, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000). The question, then, is one of fact, [*138] namely credibility, and a state court's determination on the question is consequently entitled to a

presumption of correctness which can only be overcome by "convincing evidence." *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 854, 83 L. Ed. 2d 841 (1985); *Patton*, 467 U.S. at 1036, 104 S. Ct. at 2891; 28 U.S.C. § 2254(d). *See also Thompson v. Keohane*, 516 U.S. 99, 111, 116 S. Ct. 457, 464-65, 133 L. Ed. 2d 383 (1995)(noting that while issues of juror bias involve more than basic, primary, or historical facts, their resolution depends primarily on the trial court's appraisal of witness credibility and demeanor, which is entitled to presumptive weight). Thus, the record must contain "fair support" for the state court's conclusion that a juror would be impartial. Patton, 467 U.S. at 1038.

The established standard for juror impartiality was set forth by the United States Supreme Court in *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), as follows:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of [*139] an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

(Citations omitted.) Indeed, "[a] juror's express doubt as to her own impartiality on voir dire does not necessarily entail a finding of actual bias." *Hughes*, 258 F.3d at 458. *See also Patton*, 467 U.S. at 1029-30, 1032 (holding the trial court did not commit manifest error when finding jury members to be impartial where eight of the fourteen jurors in question admitted that at some time prior to trial they had formed an opinion as to the defendant's guilt).

On the other hand, the eventual extrication of a promise from the juror that he will be fair and impartial does not

automatically result in a binding conclusion that the juror is capable of doing so. *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000), citing *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 156 (3d Cir. 1995). *See also Waldorf v. Shuta*, 3 F.3d 705, 710 (3d Cir. 1993) [*140] (finding district court relied too heavily on jurors' assurances of impartiality). Quite predictably, then, equivocal statements by a juror that he or she would try to decide the case on the evidence presented at trial are similarly insufficient. *Wolfe*, 232 F.3d at 503. "The Sixth Amendment guarantees [a criminal defendant] the right to a jury that will hear his case impartially, not one that tentatively promises to try." *Id.*

The impaneling of a biased juror, like the presence of a biased judge, "is a 'structural defect in the constitution of the trial mechanism' that defies harmless error analysis." *Hughes*, 258 F.3d at 463, citing *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992), quoting *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Therefore, if a seated juror is found to have been biased, no further inquiry as to whether or how the defendant was prejudiced is called for; instead, prejudice is presumed, and a new trial is in order.

To fully comprehend the particulars of Franklin's claim, it is necessary to examine the voir dire of Juror Arthur at some length. [*141] The first indication of potential bias on the part of Juror Arthur occurred during defense counsel's questioning of her in voir dire:

> Defense: Most people have a feeling somebody's charged with a crime -- you all watch television and you've seen L.A. Law. Some of you put it down as your favorite program, so to speak. Pretty good show. You see somebody charged get up there and say I didn't do it and here's my side of the story. Fairly common reaction for everybody.

> In this case is there anybody here that feels George [Franklin] should get on that stand, testify and tell you his side of the story or whatever he may feel to be appropriate? Anybody feel that way? Nobody wants to hear George say anything?
>
> Arthur: To prove he's innocent.
>
> Defense: Do you feel he should get on the stand to prove he's innocent?
>
> Arthur: To me, I do, you know. I do.
>
> . . . .
>
> Court: Let me interject. Three of the jurors have said what you have said and what you think. The law is that Mr. Franklin doesn't have to do anything at a trial, except be here. He's not required to prove that he's innocent. He's not required to put on any evidence and if he chooses to follow that route, [*142] you're not allowed, under the law, to consider that against him because the burden of proof is upon the prosecution. The three of you that answered the way you did, could you accept my explanation of that?

(Trial Tr. at 172-73.) The record does not reflect that any of the prospective jurors responded to the court's question. Under subsequent questioning by the prosecutor, the following exchange occurred:

> Prosecutor: Considering all the questions that were briefly asked by counsel and the judge, do you have any answers at this point in time that would cause you to hold up your hand, anything different than before?
>
> Arthur: No, I don't.

. . . .

Prosecutor: You understand it's our burden of proof and we must prove each and every element of the crimes and specification charged beyond a reasonable doubt, do you understand that?

Arthur: Yes, I do.

Prosecutor: Do you have any problem with that?

Arthur: No, I don't have any problem with it.

. . . .

Prosecutor: If we fail to prove one or more of the elements of the offense, you would acquit the defendant or find him not guilty, is that correct?

Arthur: Yes, that's right, if it's proven, [*143] yes.

Prosecutor: If we prove each and every one of those elements beyond a reasonable doubt, can you join with the rest of the panel and sign a verdict of guilty?

Arthur: Yes, if it's proven, if it's proven guilty.

. . . .

Prosecutor: So, if the facts warrant and the law allows it, can you join with eleven other jurors in a verdict of guilty, knowing that the verdict would lead to this man's death?

Arthur: Yeah, if he's proven it's the right thing, I can.

. . . .

Prosecutor: Do you know of any reason, searching your mind at this point, why you could not be a fair and impartial juror in this case?

Arthur: No, I don't.

Prosecutor: You can be just as fair to the State of Ohio as you can to the defendant?

Arthur: Yes, I can.

(Trial Tr. at 234-41.) The State then passed Arthur for cause. The following dialog took place between Juror Arthur and defense counsel:

Defense: As you sit there now, you consider George, well, he's just George. He's sitting there, he's on trial. We're officers of the court. He's sitting there he's the defendant, but as to being guilty, you have no idea whether he's guilty of this crime?

Arthur: [*144] No, I don't have no idea. But, just like the counselor said before, I would have to listen closely to why it happened.

Defense: Or how it happened?

Arthur: Yes, that's right.

Defense: Or whether George had anything to do with it?

Arthur: Yes, that's right.

Defense: In other words, one of the elements is to prove George has something to do with this crime; do you understand that?

Arthur: Uh huh.

Defense: And, although, if the prosecution was just to put on those pictures [of the victim] and say he's dead, I mean George was sitting here, that, alone, would not bring you to an opinion of his guilt or innocence?

Arthur: No, because like I said, I mean like he says, testimony, but I would just wonder why would he do it, you know?

Defense: Well, you say why would he do it, or if he did it, would you like to know that, too?

Arthur: If he did it or why did he do it.

Defense: First of all, you'd like to know if he did it?

Arthur: Yes, if he did it.

Defense: If you saw those pictures and the prosecutor pointed and said he did it, would that be enough to convince you?

Arthur: No.

Defense: In other words, you want to [*145] know more, some evidence?

Arthur: That's why I said what I did.

. . . .

Defense: I guess what we're asking for is just a fair trial.

Arthur: That's right.

. . . .

Defense: And if your son, Trent, is that it, Trent Arthur?

Arthur: That's right.

Defense: If he was on trial, sitting here in George's place, and you were on the jury, what I'm trying to say, can you be that type of juror that would give your son, Trent, the type of trial that you would want, fair, impartial trial?

Arthur: That's right, I would want him to have a fair, impartial trial.

Defense: Can you do that for George?

Arthur: I would try my best.

Defense: Do you understand that's the degree of fairness we would want?

Arthur: Yes, I understand.

Defense: . . . . Could you be the kind of juror you would want, all of you would want if it was someone close to you and just be that kind of fair juror?

Arthur: Yes, I would if it was one son or any of my kids or any of my relatives.

Defense: You understand that?

Arthur: Yes, I understand that.

Defense: All we're looking for is fairness.

Arthur: Yes, I understand.

Defense: And as [*146] I say that, there's this innocence, presumption of innocence, and you can accept that? In other words, you said that one of the things you said that, I think, on the general questions was you sort of require George to get on the stand and prove his innocence. Would you do that? Do you mean that really?

Arthur: I believe that he should bring himself out, if he didn't do it, just testify, tell what happened, you know.

Defense: And that is --

Court: It's time for the court to interrupt. Ms. Arthur, that's not the law, okay? I've sat here

plenty of times with a jury and I said to myself it would be nice if this guy would tell what happened. That's not the law. He's not required to do that and he's not required to do anything. He comes in here cloaked with the presumption of innocence. As he sits here now he's presumed innocent and under the Constitution, he's not required to do anything at all. Now, having told you that, can you abide by that and in your mind not require him to do anything?

Arthur: No, I don't require, but I just think, to tell you the truth, Judge, I don't require, but I just think if the jury would listen, like everybody says, he wants to have a fair [*147] trial. If the jury would listen to both of the lawyers, you know, and whatever evidence they had to prove him not guilty, I'd sit here and listen to it.

Court: Okay, but my point is that some point the prosecution will stop presenting evidence. At that point, once the state has stopped producing evidence, then the defense may produce evidence, if they so desire.

Arthur: Please?

Court: Once the state has stopped producing evidence, then the defense, I'm talking about Mr. Franklin, through his lawyers, may start producing evidence, if they wish, but they're not required to do that. They're not required to do anything. They could stop right there, if they wanted, have me give them the final instructions and have you go out and make your decision on the case.

Arthur: Even if the evidence is not against him, that they have brought evidence to find that he's not guilty.

Court: I missed that. I'm missing out.

Arthur: You said if the law would provide, stop providing evidence. I said even if they're for him and they're not against him, not saying he's not guilty, but they're proving, have brought evidence? You see what I'm talking about?

Court: I see what [*148] you're talking about, but do you see what I'm talking about? That is, they're not required to produce anything. The defendant isn't required to do anything in the trial except show up, do you understand that?

Arthur: Uh huh.

Court: And you're not allowed to hold it against him if he doesn't produce anything. You might be sitting there thinking maybe he could clear something up or maybe another witness could clear something up, but they're not required to do a thing. Can you abide by that and understand that?

Arthur: I guess so, if that's the law.

Court: That's the law. Mr. Schmidt, do you have any further questions?

Defense: I'm still not quite sure, Your Honor. In other words, I guess, Mrs. Arthur, and, again, this is in fairness, being fair to you, too, if we were to try the case and the state put on evidence and George didn't take the stand, would you hold that against him?

Arthur: No, I wouldn't hold it against him.

Defense: Would you think that would have something to do with his guilt?

Arthur: No.

Defense: You would think you wouldn't consider that at all?

Arthur: No, I wouldn't.

. . . .

Defense: [If your] kids came [*149] to you and said, hey, sis did this to me . . . you'd want to hear the other side, right?

Arthur: Uh huh.

Defense: If whoever was making the complaint and did all the accusations and the other one just stood there like that, your first thought is if you're not going to say anything, then what the other one said must be true, right?

Arthur: Maybe.

Defense: Well, if they stand there and be quiet and you said what about this and they said nothing?

Arthur: Aren't you going to talk, is what I said.

Defense: That's it, your tendency once you hear one side of it and the other one doesn't say anything, maybe you think, that's the whole idea of this then, that the judge has been asking you and I have been asking you. But now in the court of law the Constitution says you don't have to do that. The law says that and I guess those are interpretations that have come down over the years and that's your right, okay? But you can't think that, you see . . . .

. . . .

Arthur: But sometimes people don't have to talk to prove they're innocent. It's just there.

. . . .

Defense: . . . The way this goes, Mrs. Arthur, by law and by rules of the court, the State [*150] of Ohio has the burden of proving the elements of the crime, all right?

Arthur: Uh huh.

Defense: The state will go first and the law also says that they will go last. They will have the final argument and then the judge will give you the law: do you understand?

Arthur: Uh huh.

Defense: Actually they will paint a very dark picture or try to paint a dark picture, if they're able. That's their duty. But you've got to keep an open mind until you hear the defense, or you hear the law as it applies to what you heard. Can you do that?

Arthur: Yes, I could.

. . . .

Defense: And if the right thing, if [the death penalty] was the right thing, you would do it, right?

Arthur: That's right.

Defense: What do you consider to be the right thing?

Arthur: Well, what I consider to be the right thing is if justice is done, either way. If he's proven

> guilty, then justice is done. If he's proven not guilty, then justice is done.

(Trial Tr. at 243-58.) Defense counsel subsequently passed Juror Arthur for cause. *Id.* at 261. Later, the jury was impaneled and a jury view of the scene of the crime was conducted, after which the following conversation [*151] took place in the trial judge's chambers:

> Court: Okay, Mrs. Arthur, the reason we called you in here is because it's been reported back to me that when the jurors were out on the view that you might have asked some questions while you were out there and specifically the way it was put to me was that you may have asked a question something like this: How did he get in? Did he get in through the window downstairs?
>
> Arthur: No, the only thing I asked, I said, I didn't ask if he got in the window downstairs, I asked was that the window he got in, the window when they showed. That's the only thing I asked.
>
> Court: The thing I need to know from you is when you say he, when you're talking about he getting in. I need to know have you formed a predisposition in your mind about this man out here, Mr. Franklin?
>
> Arthur: No, I hadn't formed no position. All I just want to know is that was the house. I hadn't formed anything.
>
> Court: Who were you talking about when you said that he?
>
> Arthur: I was talking about him, but I hadn't formed anything yet.

Court: When you talk about him, are you already assuming he broke into the house, Mr. Franklin, the man out here? [*152]

Arthur: All I know is they told me he burglarized two places and I didn't know if those were the houses or not.

Court: Well, the fact, if somebody told you he burglarized two places, can you accept the fact that doesn't mean the man did it, just because somebody said he did it?

Arthur: All I know is what I was told. That's all I know.

Court: Mr. Schmidt [defense counsel], you want to tell us what your version of it is?

Schmidt: Yes, sir. When we were upstairs Mrs. Arthur said where did he break in and that was all she said.

Arthur: That's all I said. That's all I said. I didn't say anything else.

Court: Okay, are you able to keep an open mind in this case and wait until you hear all the evidence in this case?

Arthur: Yes, I will, because I hadn't formed nothing.

Court: Counsel, want to ask her any questions? Mr. Rosenwald [defense counsel]?

Rosenwald: . . . . Miss Arthur, who told you he burglarized two places?

Arthur: The only thing I heard, and I might have misunderstood it, I thought she said when we

were talking in the room that he had burglarized two places.

Rosenwald: When we were asking the questions of the jurors? [*153]

Arthur: That's all I know. Nobody did tell me. That's just what I got from you all.

Rosenwald: Do you have the impression, feeling, from what you're saying that George did break into two places?

Arthur: I really don't know, sir.

Rosenwald: All right, that's all.

Court: Anything further? Anything you gentlemen want to ask her?

Prosecutor: We were saying that, also. Do you understand that's what he's charged with and now the evidence will show whether he did it or not?

Arthur: Right, that's all I know, I don't know, sir. That's all I know.

(Trial Tr. at 701-4.) Defense counsel made, and the trial court subsequently denied, a motion for mistrial based upon Arthur's comments made at the jury view. *Id.* at 704-06. In so doing, the trial court stated it was satisfied with Arthur's explanation and that Arthur could be a fair and impartial juror. *Id.* at 706.

Without doubt, Juror Arthur made several statements throughout her voir dire indicating she expected Franklin to take the witness stand in his own defense and produce evidence to prove his innocence. The closest Arthur came to swearing she could (1) set aside her desire for Franklin to [*154] prove his innocence and (2) decide the case on the evidence presented at trial was when she denied knowing of

any reason why she could not be a fair and impartial juror in the case. (Trial Tr. at 241.) Later, however, she reiterated her belief that Franklin should "bring himself out, if he didn't do it, just testify, tell what happened," evidencing her continued belief that Franklin should take the witness stand in his own defense. (Trial Tr. at 247.) Arthur's only retreats from her belief were in response to leading questions from the prosecutor, defense counsel, or the court, and her most fully articulated responses support her belief that Franklin should prove his innocence.

Moreover, when asked if she could give Franklin a fair and impartial trial, she stated she would try her best. (Trial Tr. at 246.) Similarly, after explaining again that the burden of proof rests with the prosecution and that Franklin's silence could not be held against him, the trial court asked Arthur if she understood and could abide by the law. Arthur stated "I guess so, if that's the law." (Trial Tr. at 250.) Neither of Arthur's responses to these two questions inspire any confidence in her ability to [*155] set aside her belief that Franklin should testify in his own defense. Indeed, Arthur's last statement on the topic during voir dire indicates that she held on to her belief that Franklin had to be either proven guilty or proven not guilty. (Trial Tr. at 257-58.) Never once during her voir dire was Arthur asked to nor did she swear that she would set aside her opinion, judge Franklin solely on the evidence presented at trial, or be fair and impartial. It bears repeating here that "the Sixth Amendment guarantees [a defendant] the right to a jury that will hear his case impartially, not one that tentatively promises to try." Wolfe, 232 F.3d at 503.

This Court is aware that the Sixth Circuit Court of Appeals has recently acknowledged that "venire members commonly couch their responses to questions concerning bias in terms of 'I think,'" and that the "use of such language cannot necessarily be construed as equivocation." *Miller v.*

Francis, 269 F.3d 609, 618-19 (6th Cir. 2001). Nevertheless, considering the totality of Arthur's comments during voir dire, the equivocal nature of Arthur's words cannot be overcome by the eventual extrication from her of [*156] statements that she would be impartial.

To be sure, Arthur stated she would not hold Franklin's silence against him or consider it evidence of his guilt. After defense counsel presented Arthur with a hypothetical situation where one of Arthur's children might tattle on another, and after he questioned her as to what she would do if the accused child stood silent, Arthur explained that "sometimes people don't have to talk to prove they're innocent." (Trial Tr. at 254.) That statement reveals that although Arthur might not hold Franklin's silence against him, she retained her belief that his innocence should be proven by some means.

Also telling of Arthur's inability to set aside her expectation that Franklin should prove his innocence is her statement during voir dire in which she explained what she considered would be the "right thing" to do. Arthur stated, "Well, what I consider to be the right thing is if justice is done, either way. If he's proven guilty, then justice is done. If he's proven not guilty, then justice is done." (Trial Tr. at 258.) This statement conveys Arthur's belief that either the State would prove Franklin guilty, or Franklin would prove himself not guilty [*157] during the trial. That she was open to either eventuality does not ameliorate Arthur's fundamental misunderstanding of the trial process. Arthur's statement would provide no cause for concern had she said "if he's proven guilty, then justice is done. If he's not proven guilty, then justice is done," but that is not what she said. Instead, her response illustrates the ineffectiveness of the trial judge's attempts to neutralize Arthur's expectation that Franklin should prove his innocence.

The intractability of Arthur's belief is also evidenced by her question at the jury view as to whether a particular window in Strauss' apartment was the one "he" went through, and her explanation of that comment to the court in chambers after returning from the view. The trial court specifically questioned Arthur as to whom she was referring when she asked her question, and she candidly stated that she was referring to Franklin, and that she wanted to know if a particular window was the one Franklin had gone through. Arthur repeatedly stated that all she knew was what she had been told and that she had been told Franklin had broken into two places. Although her unsolicited question at the jury [*158] view and her responses to the court's questions in chambers evidenced a presumption of Franklin's guilt, under questioning by the prosecutor she eventually conceded that she really did not know if Franklin had broken into the homes. The trial court overruled Franklin's motion for a mistrial.

In spite of the trial court's repeated attempts to explain that Franklin had no burden to prove his innocence, and that the entire burden of proof at trial belonged to the State, Arthur persisted in her desire for Franklin to prove himself not guilty. Moreover, after being sworn in as a juror, Arthur expressed in words that cannot be misconstrued that she already believed Franklin to be the person who broke into Strauss' apartment, questioning only which of the windows was the one through which he had gained access. As she stated in the trial judge's chambers, the "he" she spoke of at the jury view was Franklin, and her belief that he had broken into Strauss' apartment was predicated on what she had heard, e.g., that Franklin had broken into two residences, even though no evidence had yet been presented to the jury. Arthur never stated (perhaps because she was never asked) whether she could set [*159] aside either her desire for Franklin to prove his innocence or her belief that he was

indeed the person who broke into Strauss' apartment. On that point, then, her credibility was not determined by the trial court. In fact, even her answers to the voir dire questions that might be construed as seeking such a commitment from her were equivocal. For instance, when she was asked if she could be the kind of juror she would want someone close to her to have if he or she were a defendant, Arthur said, "Yes, I would if it was one son or any of my kids or any of my relatives." (Trial Tr. at 247.) Her answer establishes that she could be a fair juror for a family member, but pointedly does not demonstrate that she could be the same for Franklin. Additionally, Arthur's concept of fairness is revealed in her statement during her voir dire, where she stated justice would be done by Franklin's being proven guilty or proven not guilty, implicitly revealing that she had not absorbed, or perhaps not comprehended, the trial judge's attempts to rehabilitate her after she disclosed her partiality. *Cf. Logan v. Lockhart*, 994 F.2d 1324, 1326-27 (8th Cir. 1993)(rejecting the petitioner's [*160] biased juror claim on grounds that juror's statement revealing her belief that the defendant had to show he was innocent came before she had been instructed on the relevant law and because the juror later stated she had no bias in the matter).

Even if that were not so, however, the Court finds nothing in Arthur's statements during voir dire or following the jury view that could constitute an "unwavering affirmation[] of impartiality." *United States v. Garcia*, 936 F.2d 648, 653 (2d Cir. 1991). As the Sixth Circuit did in *Wolfe v. Brigano*, 232 F.3d 499 (6th Cir. 2000), this Court concludes that the trial court based its finding of Arthur's impartiality on statements that were equivocal or tentative, especially in light of Arthur's complete silence on whether she could set aside her preconceived notions concerning her expectation that Franklin's innocence would be proven at trial and her assumption -- prior to the presentation of any

evidence -- that Franklin was the individual who entered Strauss' apartment through a window.

In this, his sixth ground for relief, Franklin raised Juror Arthur's bias as trial court error that violated his right [*161] to be tried by an impartial jury, presumably because he believes it was the trial judge's duty to excuse Arthur sua sponte after Franklin's defense counsel did not challenge her peremptorily or for cause. The Sixth Circuit has adopted the following description of a trial court's responsibility regarding voir dire:

> [A] broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality . . . [.] Accordingly, the presiding trial judge had the authority and responsibility, either sua sponte or upon counsel's motion, to dismiss prospective jurors for cause. . . . *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997)(quoting *Frazier v. United States*, 335 U.S. 497, 511, [69 S. Ct. 201, 93 L. Ed. 2d 187] (1948)).

Hughes v. United States, 258 F.3d 453, 464 (6th Cir. 2001)(internal quotation marks omitted). In addition, the Supreme Court of the United States has recognized the trial judge's duty to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen," a responsibility [*162] that encompasses dismissal of biased prospective jurors even in the absence of a challenge by one or the other party. *See Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 944-47, 71 L. Ed. 2d 78 (1982). In light of the discussion above, this Court concludes that the trial court's implicit finding that Juror Arthur was impartial and free of bias is not fairly supported by the record, and that the presumption of correctness normally due trial court factual findings is

consequently inapplicable in this instance. Instead, this Court finds that the trial judge had a duty to *sua sponte* dismiss Arthur from the jury venire, and that the trial court's failure to do so constituted manifest error. *See Hill v. Brigano*, 199 F.3d 833, 843 (6th Cir. 1999)(quoting *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984)(citing *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)).

Moreover, reasonably competent counsel would have exercised a challenge for cause to strike Juror Arthur from the jury. Although it is conceivable that Franklin's trial counsel declined to challenge Juror [*163] Arthur because she was of the same race as Franklin, the question whether to seat a biased juror is not a discretionary or strategic decision. *Hughes*, 258 F.3d at 463. A contrary finding would allow trial counsel to waive, in effect, a criminal defendant's right to an impartial jury, an intolerable result. *Id.* Since Franklin's trial counsel did not attempt to strike Juror Arthur, their representation was, to that extent, deficient. It follows that Franklin's appellate counsel were ineffective for their corresponding failure to raise the trial court error and the ineffectiveness of Franklin's trial counsel as error on direct appeal.

"The impaneling of a biased juror warrants a new trial. . . . The 'presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.'" *Hughes*, 258 F.3d at 463, quoting *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). In addition, Franklin's trial and appellate counsels' ineffectiveness allowed a biased juror to sit in judgment, rendering the adversary process in Franklin's case presumptively unreliable. *See United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984); [*164] *Hughes*, 258 F.3d. at 463. Thus, prejudice is presumed respecting Franklin's claims of trial court error and

ineffective assistance of his trial and appellate counsel respecting Juror Arthur's service on his jury.

Finally, the Court notes that Juror Arthur executed an affidavit in April, 1993, in which she stated, among other things, that it seemed to her that Franklin's lawyers "should have done more to prove that George was not guilty" and that the defense counsel "should have brought out more evidence to help George." (Return of Writ, Doc. No. 15, Exhibit X at P7.) Arthur indicated that had the defense done so, she might have voted against Franklin's conviction. *Id.* While it is true that Ms. Arthur also stated she voted for conviction in response to alleged pressure by the other jurors, she leaves no doubt that her fundamental misconception of the burden of proof at trial remained firmly entrenched after the trial judge's repeated attempts to rehabilitate her during voir dire and after the jury view, through Franklin's trial unaffected by the jury instructions, and into 1993 when she executed her affidavit. Therefore, even if Franklin were required to show prejudice [*165] from the trial court error and the ineffectiveness of his trial and appellate counsel concerning the seating of a biased juror, he could likely do so. Regardless, because the law requires no such showing, this Court makes no determination as to whether Franklin was actually prejudiced by Arthur's service on his jury. Moreover, the Court is of the opinion that Juror Arthur's statements in voir dire alone provided the trial court and defense counsel with undeniable evidence of Arthur's unshakable belief or desire that Franklin should prove his innocence to her. Her comments at the jury view and in her sworn affidavit serve to verify what is obvious from her voir dire: that Arthur was not rehabilitated by the trial court's repeated instruction as to the burden of proof and to whom it belonged.

Given that a biased juror was impaneled in Franklin's case, prejudice from the trial court error and the

ineffectiveness of Franklin's trial and appellate counsel is presumed and a new trial is required. The Court recommends that a conditional writ of habeas corpus be granted on Franklin's sixth ground for relief, and on his first and second grounds for relief to the extent that they claim ineffective [*166] assistance of Franklin's trial and appellate counsel with respect to his claim regarding Juror Arthur.

Seventh Ground for Relief

In his seventh ground for relief, Franklin claims his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated by the trial court's denial of his motion to sever the count charging him with the burglary of Winston's apartment from the counts involving the murder of Strauss and burglary of Strauss' apartment. Respondent argues that Franklin procedurally defaulted this claim.

Franklin raised the issue of joinder before trial and on direct appeal to both the intermediate court of appeals and the state supreme court. At all stages, the state courts addressed the issue on the merits, and it consequently has not been procedurally defaulted. This is so even though the state post-conviction courts properly declined to address the merits of the same claim on res judicata grounds. *See Jamison v. Collins*, 100 F. Supp.2d 647, 698 (S.D. Ohio 2000)(noting that Ohio law requires that an Ohio court's final decision on direct appeal has res judicata effect, barring further [*167] consideration by the Ohio courts in a post-conviction proceeding). A claim of error may be preserved by raising it either on direct appeal or in post-conviction relief proceedings in Ohio because those proceedings are not duplicative of one another. On direct appeal, the appellant is permitted, indeed required, to raise any errors which are apparent from the record, whereas in post-conviction relief proceedings, the petitioner is permitted to raise only those

errors that require consideration of evidence outside the record. *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). Thus, it is neither necessary nor desirable for an offender to raise the same issues in both proceedings, although that seems to occur with surprising regularity. That Franklin's counsel raised the joinder issue in post-conviction, therefore, does not negate the state courts' earlier consideration of the merits of the claim on direct appeal and there has consequently been no procedural default of the instant ground for relief.

Granting or denying severance is within the trial judge's discretion, and a state trial court's alleged abuse of discretion, without more, is not a constitutional [*168] violation. *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001), citing *Glinsey v. Parker*, 491 F.2d 337, 343 (6th Cir. 1974) and *Sinistaj v. Burt*, 66 F.3d 804, 805, 808 (6th Cir. 1995).[6] Nor is the mere potential for confusion among the jurors, standing alone, weighty enough to overcome society's interest in the speedy and efficient resolution of criminal trials, which is the State's interest in joinder of offenses. Stanford, 266 F.3d at 459, citing *United States v. Moore*, 917 F.2d 215, 222 (6th Cir. 1990).

The standard applicable to Franklin's seventh ground for relief has recently [*169] been cogently set forth by the Ninth Circuit Court of Appeals as follows:

> On habeas review of a prisoner's challenge to a trial court's failure to sever trial of some counts in

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[6] The Sixth Circuit Court of Appeals has recognized that *Sinistaj* is "in direct contravention of Supreme Court precedent" respecting its determination of a Teague issue. *Lyons v. Stovall*, 188 F.3d 327, 339 (6th Cir. 1999). That acknowledgment, however, does not effect the proposition for which *Sinistaj* is cited here.

> an indictment, [a federal court] may only grant the writ if the joinder resulted in an unfair trial. There is no prejudicial constitutional violation unless "simultaneous trial of more than one offense . . . actually rendered petitioner's state trial fundamentally unfair and hence, violative of due process." *Featherstone v. Estelle*, 948 F.2d 1497, 1503 (9th Cir. 1991)[(quoting *Tribbitt v. Wainwright*, 540 F.2d 840, 841 (5th Cir. 1976))]. This prejudice is shown if the impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict. *See Bean v. Calderon*, 163 F.3d 1073, 1086 (9th Cir. 1998), *cert. denied* 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

Sandoval v. Calderon, 241 F.3d 765, 771-72 (9th Cir. 2001). In *Corbett v. Bordenkircher*, 615 F.2d 722 (6th Cir. 1980), the Court of Appeals accurately observed that in habeas, the issue before a federal [*170] court is not whether the failure to sever certain counts from others was a violation of a rule of state or federal procedure, but rather whether the failure to sever denied the petitioner due process of law under the Fourteenth Amendment. *Id.* at 724. Consequently, even if the state trial court's decision respecting joinder were an abuse of discretion under the relevant rules of evidence, that in and of itself falls far short of implicating error of a constitutional dimension. *See Krist v. Foltz*, 804 F.2d 944, 947-48 (6th Cir. 1986); *United States v. Follette*, 364 F.2d 305, 306 (2d Cir. 1966).

The Court notes that the state court of appeals determined that the joinder of the three offenses was appropriate under Ohio law, since evidence of Count Three (the burglary of Rosha Winston's residence) would have been admissible in a separate trial on Counts One and Two (the offenses relating to Gerald Strauss), and vice versa. *State*

v. Franklin, 1990 Ohio App. LEXIS 3385, No. C180028, 1990 WL 117140 at *5-6 (Ohio App. 1st Dist. Aug. 15, 1990). The state supreme court concluded that the evidence of each of the offenses joined at trial was simple and [*171] direct, and therefore unlikely to be confusing to the jury. *State v. Franklin*, 62 Ohio St. 3d 118, 122-23, 580 N.E. 2d 1 (Ohio 1991). A federal court is bound by a state court's determination of a matter of state law. *Brown v. Ohio*, 432 U.S. 161, 167, 97 S. Ct. 2221, 2226, 53 L. Ed. 2d 187 (1977); *Krist v. Foltz*, 804 F.2d 944, 947-48 (6th Cir. 1986). Thus, the only question for this Court is whether the joinder of offenses in Franklin's case resulted in such prejudice as to deprive Franklin of his constitutional rights to due process and a fair trial.

Here, Franklin claims the prejudice he suffered from joinder of the Winston and Strauss offenses was that "these charges were tried together." (Amended Petition, Doc. No. 25 at 101.) In his Traverse, he contends that there was the "manifest risk that the jury cumulated the evidence and convicted Mr. Franklin of these charges when he would not have been convicted had the charges been severed." (Traverse, Doc. No. 50 at 163-64.) Claiming there was a "manifest risk" of the jury's cumulation of evidence does not demonstrate the actual and egregious prejudice required to make out a deprivation [*172] of Franklin's constitutional right to due process. Nor does the argument convince this Court that Franklin's trial was rendered unfair by the joinder of offenses.

Franklin also asserts that "joinder may have compromised [his] rights at trial" since an accused may wish to testify on one but not the other of the joined offenses. *Id.* at 164. Franklin does not claim that he either wanted to or would have testified on any of the counts on which he was tried. Consequently, this argument, too, fails to demonstrate to a satisfactory degree that Franklin's trial was unfair due to

the joinder of offenses, or that he was deprived in any way of the due process to which criminal defendants are entitled.

Because Franklin has not shown that the allegedly impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict, he has not demonstrated that the joinder infringed on his rights to due process and a fair trial. Franklin's seventh ground for relief should be denied.[7]

[*173]

Eighth Ground for Relief

In his eighth ground for relief, Franklin claims he was deprived of "potentially exculpatory and impeachment evidence" at trial in violation of the rule announced in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995). (Amended Petition, Doc. No. 25 at 103.) In his Traverse, Franklin argues that several items of evidentiary value were withheld from the defense at trial, and that they collectively point to the possibility that another person committed the Gerald Strauss murder. (Traverse, Doc. No. 50 at 165-68.)

Although Respondent acknowledges that the state trial court and the First District Court of Appeals addressed the instant issue on its merits in Franklin's post-conviction relief proceedings, she nevertheless contends it has been procedurally defaulted. Franklin, however, properly preserved the issue for habeas review by appropriately raising it in his state post-conviction petition and supporting

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[7] Franklin has not contended his trial or appellate counsel were ineffective for not calling the joinder issue to the state courts' attention.

the claim with evidence outside the record. The state trial court and court of appeals both addressed the merits [*174] of Franklin's claim. It is true that the Ohio Supreme Court declined jurisdiction over Franklin's subsequent discretionary appeal to that court, but in such cases, a petitioner's claims are not procedurally defaulted. Instead, this Court "looks through" the state supreme court's unrevealing decision to the last state court to consider the issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). If that court addressed the merits of the claim, then a federal court must do so as well in a habeas proceeding. *Id.* Such is the case here.

Respondent also contends Franklin's claims of a *Brady* violation are meritless because the items complained of are not material, and Franklin cannot show prejudice from their having been withheld.

Preliminarily, the Court observes that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment irrespective of the good faith or bad faith of the prosecution. Brady, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215. *Brady* did not create a general constitutional right to discovery in a criminal case; rather, the [*175] rule established therein "is concerned only with cases in which the government possesses information which the defendant does not, and the government's failure to disclose the information deprives the defendant of a fair trial." United *States v. Mullins*, 22 F.3d 1365, 1371 (6th Cir. 1994).

A new trial will be granted for a *Brady* violation only if the defendant can demonstrate both that the prosecution withheld exculpatory evidence, *See United States v. Phillip*, 948 F.2d 241, 249 (6th Cir. 1991), and that the evidence was material in that the defendant did not receive a fair trial because of its absence, *See United States v. Frost*, 125 F.3d

346, 382-83 (6th Cir. 1997). In *Schledwitz v. United States*, 169 F.3d 1003 (6th Cir. 1999), the Sixth Circuit elaborated upon the "materiality" requirement of *Brady* as follows:

> When the defendant . . . asserts that the newly discovered *Brady* evidence is exculpatory, the defendant will be entitled to a new trial if he shows that the favorable evidence at issue was "material." *United States v. Frost*, 125 F.3d 346, 382 (6th Cir. 1997). In *Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), [*176] the Supreme Court clarified the "materiality" analysis. The Court explained that a showing of materiality does not require the suppressed evidence in question establish the defendant's innocence by a preponderance of the evidence. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434; Frost, 125 F.3d at 382-83. Nor does the defendant need to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35; *United States v. Smith*, 316 U.S. App. D.C. 199, 77 F.3d 511, 515 (D.C.Cir. 1996)(materiality requirement is not a sufficiency-of-the-evidence test).
>
> Instead, any favorable evidence, regardless of whether the defendant has made a request for such evidence, is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been [*177] different." *Kyles*, 514 U.S. at

> 433-34 (quoting, *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)); Frost, 125 F.3d at 382. A "reasonable probability" is a "probability sufficient to undermine the confidence in the outcome." Bagley, 473 U.S. at 682; *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988).

Schledwitz, 169 F.3d at 1011-12 (parallel citations omitted). More recently, the Supreme Court has summarized the three components of a "true *Brady* violation" as follows: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999). With these principles in mind, the Court now turns its attention to the merits of Franklin's eighth ground for relief.

The substance of two investigative summaries Franklin claims constitute *Brady* material [*178] is that the Cincinnati Police Department received information that some of Strauss' stolen property was being kept in a Woodburn Avenue apartment. (Return of Writ, Doc. No. 15, Exhibit W, Exhibits Q-2 and Q-22 therein.) That information came to the police via Ron Jones, who reported that a Steve Boseman told him that Boseman had been an acquaintance of Franklin's and that was how he knew where the stolen property was being kept. *Id.* Boseman did not provide Jones with the street number of the apartment; however, the police report indicates that Michael Turnbolt, who testified at Franklin's trial, lived on Woodburn Avenue, and that the police had been to Turnbolt's apartment as part of their investigation. *Id.*

The next pair of summaries shows that one of Strauss' neighbors, Jay Lazarus, saw a black male in his thirties, under six feet tall, stocky in build, and wearing a red or blue windbreaker, emerging from the area between Strauss' side of the Corry Street apartment building and the building next door. (Return of Writ, Doc. No. 15, Exhibit W, Exhibits Q-3, Q-4, and Q-23 therein.) Although unsure if it was the same night, Lazarus stated that he later heard noises outside his [*179] window and observed a different, taller, thinner, and younger black male near where some of the items taken from Strauss' apartment were eventually found. *Id.*

Another investigative summary makes note of the discovery of a dark shirt from a wooded area behind Strauss' residence, and indicates that the shirt was turned over to the coroner's office for processing. (Return of Writ, Doc. No. 15, Exhibit W, Exhibit Q-5 therein at 7.) The next summary describes the arrest of one Gregory Simpson on an aggravated burglary charge. (Return of Writ, Doc. No. 15, Exhibit W, Exhibit Q-6 therein.)[8] Simpson remarked that he had committed several burglaries with Franklin and that the two of them had "done fairly well" in that enterprise. *Id.*

Some of the summaries detail other burglaries that apparently occurred in Strauss' neighborhood around the same time as his murder. (Return of Writ, Doc. No. [*180] 15, Exhibit W, Exhibits Q-7, Q-13, Q-21 therein.) Another undated summary is a note from "Moon" to "Mike & Bill" stating how "this guy" was in a parking lot near Strauss' apartment and was locked up on a traffic warrant and a felony capias. (Return of Writ, Doc. No. 15, Exhibit W, Exhibit Q-20 therein.) The note further states that the "guy" was being fingerprinted "so we can check him out," and that

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[8] The document cited is a duplicate of another identified as Return of Writ, Doc. No. 15, Exhibit W, Exhibit Q-8 therein.

the addressees should "let Jones know about him." *Id.* A handwritten note shows that Clenell Bailey, a landlord in the area of the Strauss murder and burglary, told police he suspected a connection between some of his renters, who were parolees, and the murder. (Return of Writ, Doc. No. 15, Exhibit W, Exhibit Q-1 therein.)

The next investigative summary shows that the police intended to have DNA analysis performed on a sweatshirt recovered from the apartment where Franklin was eventually found and arrested. (Return of Writ, Doc. No. 15, Exhibit W, Exhibit Q-10 therein.) Another describes how some of the items taken from Strauss' apartment and the suspected murder weapon, a hammer, were found in a wooded area behind a house in the neighborhood. (Return of Writ, Doc. No. 15, Exhibit [*181] W, Exhibit Q-15 therein.)

Finally, there are three pages of handwritten notes including a list of Gerald Strauss' friends, and suspects in his murder, as well as the names of some known offenders who were presumably possible suspects. (Return of Writ, Doc. No. 15, Exhibit W, Exhibits Q-17 and Q-18 therein.)

Franklin contends that the exhibits noted above implicate others in the Strauss murder and burglary, that the case against him was weak and circumstantial, and that had the information above been provided to the defense, there is a reasonable probability that the result of Franklin's trial would have been different. (Traverse, Doc. No. 50 at 167.) Demonstrating a reasonable probability that the result of the trial would have been different, however, is not the same as simply saying so.

This Court is not convinced that Franklin's trial was unfair as a result of the absence of the evidence submitted in support of his eighth ground for relief. The ability to conjure up and cast a shadow of suspicion on another, no matter how translucent and pale, no matter how tangential or chimerical,

does not meet the standard for materiality. Thus, the reports of other burglaries in the Strauss [*182] neighborhood, a landlord's suspicions about his tenants, an admission of a former accomplice to having committed burglaries with Franklin in the past, and a shirt found in the woods behind Strauss' apartment that could have belonged to anyone do not amount to *Brady* material. Furthermore, even presuming the defense could have successfully brought out at trial the allegation that some of the property stolen from Strauss' apartment was being stored at Michael Turnbolt's residence, which would require a daunting leap from a supposition to a conclusion, that information is not necessarily exculpatory of Franklin or inculpatory of Turnbolt in Strauss' murder. One could draw any of several conclusions from such information, including that Turnbolt believed Franklin had come into lawful possession of the property, that Turnbolt innocently purchased the property from Franklin, or that Turnbolt was a fence for the stolen property, none of which would implicate Turnbolt in Strauss' murder or the burglary of Strauss' apartment, for that matter. Moreover, even if the information contained in the investigative summary were inculpatory toward Turnbolt, it would not automatically follow that [*183] Franklin would be proportionately exculpated. In other words, there is no see-saw-like effect where the inculpation of one person necessarily exculpates another in geometric symmetry.

Finally, nothing in the documentation submitted to this Court shows that Lazarus' description of the first man -- five feet, six inches in height, stocky build -- is incompatible with Franklin's appearance in the summer of 1988. While Lazarus estimated the first man's age at thirty, and Franklin was only twenty-two at the time of the offenses, the record is silent as to whether Franklin looked older, younger, or exactly his age. Thus, this Court can draw no conclusion as to whether Lazarus' description generally matched or sharply conflicted

with Franklin's appearance. In addition, Lazarus was never able to state with any certainty when it was that he saw the taller, thinner man appearing to hide something near the wooded area where some of the Strauss property was recovered. That information would only have been useful to the defense if Lazarus had been able to state that it was the night of or the night after the murder, since the Strauss property was recovered at approximately 2:00p.m. on August 10, 1988, less [*184] than thirty hours after the murder was discovered. The record before this Court, however, is particularly unclear about when Lazarus saw what he saw.

The Court concludes that the evidence presented in support of Franklin's *Brady* claim does not meet the requirement that such evidence be material and exculpatory. Franklin's eighth ground for relief should be denied.

Ninth Ground for Relief

In his ninth ground for relief, Franklin argues that he was denied meaningful proportionality review of his death sentence in the state court of appeals and state supreme court because those courts compared his sentence only to other cases in which the death sentence was imposed, and because the proportionality review conducted by the Ohio courts is merely cursory.

Respondent claims Franklin procedurally defaulted this claim. Whether that is true or not, Franklin's claim would fail on its merits because Judge Spiegel of this Court recently rejected these same arguments in *Smith v. Anderson*, 104 F. Supp.2d 773, 829-30 (S.D. Ohio 2000). *See also Scott v. Anderson*, 58 F. Supp.2d 767, 797-98 (N.D. Ohio 1998)(noting that "when a state appellate court expressly [*185] states that it has conducted a proportionality review, this court may not assume that the review was inadequate [or did not really occur] merely because the state court did not describe in writing all aspects of its review"), reversed in part

on other grounds, *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000); *McQueen v. Scroggy*, 99 F.3d 1302, 1333-34 (6th Cir. 1996)(stating that there is "no federal constitutional requirement that a state appellate court conduct a comparative proportionality review). On the authorities cited, the Magistrate Judge recommends Franklin's ninth ground for relief be denied.

Tenth Ground for Relief

In his tenth ground for relief, Franklin contends that the Hamilton County Prosecutor's Office employs racially discriminatory procedures in determining who should be charged with death-eligible offenses, and that consequently his conviction and death sentence were obtained in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. In support, Franklin cites various government publications and news sources detailing the percentages of African-American death row inmates with [*186] their percentages in the population of Ohio generally, and the alleged correlation between the race of the murder victim and the likelihood that the offender will be charged with a death-eligible offense.

Respondent cites the state post-conviction courts' conclusions which were that the claim was meritless under *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). In McCleskey, the Supreme Court determined that a statistical study suggesting racially-based disparities in the selection and prosecution of death penalty cases was insufficient to support an inference that the decisionmakers in McCleskey's case acted with a discriminatory purpose. Just as in McCleskey, Franklin has produced no evidence that the decisionmakers in his case acted in a discriminatory manner. Accordingly, Franklin's claim must fail, and the Magistrate Judge recommends his tenth ground for relief be denied.

Eleventh Ground for Relief

In his eleventh ground for relief, Franklin claims the Ohio death penalty statutory scheme is unconstitutional for thirteen reasons. Respondent argues that the merits of Franklin's claim was addressed exhaustively in [*187] the state courts, and were properly found to be without merit. Respondent does not contend that any of Franklin's sub-claims have been procedurally defaulted, so this Court must address the merits of each, and will do so in the order they have been presented.

First, Franklin claims the Ohio death penalty statutory scheme is unconstitutional because it invests the prosecutor with unregulated discretion in determining whom to charge with a capitally-eligible offense. The same claim has been rejected by this Court in *Zuern v. Tate*, 101 F. Supp. 2d 948, 1002 (S.D. Ohio 2000) on the authority of *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Franklin's first sub-claim fails to persuade this Court that it should find differently in his case.

Second, Franklin argues that the Ohio statutory scheme is unconstitutional because it requires no showing that the offender engaged in premeditation or deliberation in the commission of the murder before a death sentence may be imposed. On the authority of *Tison v. Arizona*, 481 U.S. 137, 158, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987), Franklin's claim is meritless.

Franklin's [*188] third sub-claim posits that Ohio's statutory scheme is unconstitutional because it fails to establish a standard for determining the existence of mitigating factors. The United States Supreme Court has never held that "the state must affirmatively structure in a particular way the manner in which juries must consider mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S. Ct. 757, 761, 139 L. Ed. 2d 702 (1998). The Court notes, too, that the Ohio statutes clearly place the

burden of proving the existence of any mitigating factors on the defendant in a capital case, Ohio Rev. Code § 2929.03(D)(1), and a requirement that the defendant do so by a preponderance of the evidence does not offend the federal constitution. *See Walton v. Arizona*, 497 U.S. 639, 649-51, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). Franklin's third sub-claim is meritless.

In his next sub-claim, Franklin alleges the Ohio death penalty statutes are unconstitutional because they fail to establish a standard by which to balance the mitigating factors against the aggravating circumstances. The Court finds Franklin's claim unavailing on the authority [*189] of *Tuilaepa v. California*, 512 U.S. 967, 979, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994), *Walton v. Arizona*, 497 U.S. 639, 649-50, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), and *Proffitt v. Florida*, 428 U.S. 242, 257-59, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

In his fifth sub-claim, Franklin asserts that the Ohio death penalty statutes are unconstitutional because they permit the sentencing body to consider aggravating circumstances at the trial level. That argument has been rejected by this Court in *Zuern v. Tate*, 101 F. Supp. 2d 948, 1003-04 (S.D. Ohio 2000), on the authority of *Tuilaepa v. California*, 512 U.S. 967, 971-72, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994).

Next, Franklin argues that the Ohio statutory scheme is unconstitutional because it does not allow the sentencing body the option of imposing a life sentence when the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Franklin's claim fails under *Blystone v. Pennsylvania*, 494 U.S. 299, 305, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 377, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990). [*190] Similarly, this Court has stated that "there is no

constitutional impediment to a state enacting a capital punishment statute which mandates the imposition of the death penalty, when the state has proved, beyond a reasonable doubt, that the aggravating circumstances outweigh the mitigating factors." *Zuern*, 101 F. Supp. 2d at 987. Consequently, the Court finds Franklin's argument unpersuasive.

In his seventh sub-claim, Franklin contends that the Ohio death penalty statutes are unconstitutional because they permit a defendant's guilt and sentence to be determined by the same jury. In fact, Ohio law requires the jury to determine whether the aggravating circumstances outweigh the mitigating factors after the sentencing phase of trial, then to make a sentencing recommendation to the trial court. Ohio Rev. Code § 2929.03(C)(2)(b)(ii)and (D)(2). If the jury recommends a sentence other than death, the trial court is bound by the jury's recommendation; if the jury recommends death, however, the trial court must undertake an independent weighing of the aggravating circumstances and mitigating factors and come to its own conclusion as to whether [*191] death is the appropriate sentence. Ohio Rev. Code § 2929.03(D)(2)and (D)(3). In other words, the trial court is not absolutely bound by the jury's recommendation that the death sentence be imposed. Moreover, a sentencing scheme providing for a jury determination of the appropriate sentence in capital cases has been upheld against a constitutional attack in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). *See also Hildwin v. Florida*, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)(upholding the constitutionality of a death penalty statutory scheme that required a jury to render an advisory sentencing verdict, but preserved the ultimate factfinding and decision for the trial court); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990)(noting that death penalty statutory schemes dividing sentencing responsibility between judges and juries

have been upheld, citing *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990)). In light of these authorities, the Court finds Franklin's seventh sub-claim meritless.

In his next sub-claim, Franklin [*192] argues that Ohio's death penalty statutory scheme unconstitutionally encourages capital defendants to plead guilty. The same claim was rejected in *Zuern*, 101 F. Supp. 2d 948, at 1004-05, on the authority of *Corbitt v. New Jersey*, 439 U.S. 212, 218, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978). *Accord, Scott v. Anderson*, 58 F. Supp.2d 767, 796 (N.D. Ohio 1998), reversed in part on other grounds, *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000).

In his ninth sub-claim, Franklin contends that Ohio's death penalty statutes create a mandatory death penalty by requiring the jury to recommend a sentence of death when it finds, beyond a reasonable doubt, that the aggravating circumstances outweigh "only to the slightest degree" the mitigating factors. This claim fails for the same reason it suffered a similar fate in *Byrd v. Collins*, 209 F.3d 486, 539 (6th Cir. 2000).

Franklin's next sub-claim alleges the unconstitutionality of the Ohio death penalty statutes because they permit the State to argue first and last in the mitigation phase of trial. Beyond this contention, Franklin provides no argument or support for [*193] his claim, and this Court is at a loss as to how such a practice would implicate any federal constitutional right.

In his eleventh sub-claim, Franklin challenges the constitutionality of the Ohio death penalty statutes on the ground that they permit the death penalty to be administered in an arbitrary, capricious, and discriminatory manner. That claim has been rejected by the Sixth Circuit Court of Appeals. *Buell v. Mitchell*, 274 F.3d 337, 367 (6th Cir. 2001).

Next, Franklin argues that the Ohio death penalty statutes are unconstitutional because they allow an element of aggravated murder to be considered as an aggravating circumstance in the mitigation phase of trial. The United States Supreme Court, however, settled the same question against the petitioner in *Lowenfield v. Phelps*, 484 U.S. 231, 241-46, 108 S. Ct.546, 98 L. Ed. 2d 568 (1988); *see also Buell*, 274 F.3d at 369 (applying *Lowenfield* and concluding the Ohio statutory scheme is not constitutionally infirm on the ground stated here).

In his final sub-claim attacking the constitutionality of the Ohio death penalty statutory scheme, Franklin argues that the requirement [*194] that the results of any mental examination and background investigation requested by a capital defendant be provided to the trial court, jury, and prosecutor deprived him of some unspecified constitutional right. In *Jamison v. Collins*, 100 F. Supp.2d 647, 764 (S.D. Ohio 2000), the court had this to say about the instant sub-claim:

> Under Ohio law, the right to present mitigating evidence during the penalty phase of a capital trial belongs to the capital defendant. *See* Ohio Rev. Code § 2929.04(B). Neither the trial court nor the prosecutor may comment on the mitigating factors listed in § 2929.04(B) that the defendant does not raise during the penalty phase. *See State v. DePew*, 38 Ohio St.3d 275, 289, 528 N.E.2d 542, 557 (1988). Nonetheless, if a defendant relies on § 2929.03(D)(1) to gather mitigating evidence, the reports thereby prepared are presented to the jury and the judge without any redaction of irrelevant or prejudicial information. Use of this provision, then, essentially takes away from the defendant the right to channel the mitigating evidence described in § 2929.04(B).

> Although the provision [*195] is troubling to this Court, we cannot hold that Ohio's death penalty scheme is unconstitutional because of it. We reach this conclusion based on the fact that a defendant is not required to request a presentence investigation report or a mental examination. *See* Ohio Rev. Code § 2929.03(D)(1); *State v. Buell*, 22 Ohio St. 3d 124, 22 Ohio B. 203, 138, 489 N.E.2d 795, 808-809. In addition, the Court notes that Ohio Revised Code § 2929.024 allows a trial court to provide funds to an indigent defendant for investigative services, experts, and other services necessary in the preparation of a defense. Therefore, an indigent defendant is not required to resort to § 2929.03(D)(1). *Cf. State v. Esparza*, 39 Ohio St.3d 8, 16-18, 529 N.E.2d 192, 200-203 (1988) (Brown J., dissenting). For these reasons, we conclude that § 2929.03(D)(1) is not unconstitutional.

Rejection of the same claim was affirmed by the Sixth Circuit Court of Appeals in *Byrd v. Collins*, 209 F.3d 486, 539 (6th Cir. 2000).

For the foregoing reasons, the Court finds Franklin's claims respecting the alleged unconstitutionality of the Ohio death [*196] penalty statutory scheme unavailing, and recommends that his eleventh ground for relief be denied.

Twelfth Ground for Relief

Franklin contends in his twelfth ground for relief that his convictions for the Winston and Strauss burglaries/murder were based on insufficient evidence.[9]

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[9] For purposes of this ground for relief, the Court indulges in an already-rebutted presumption that Franklin's trial was in

Respondent counters that Franklin's claim is without merit, and cites the state court of appeals' and Ohio Supreme Court's judgments on direct appeal for support.

In *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), the Supreme Court discussed the standard applicable to a federal court's review of a state conviction on a sufficiency-of-the-evidence claim in some detail. The Court stated as follows:

> In [*In re*] *Winship*, [397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970),] [*197] the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." . . . The standard of proof beyond a reasonable doubt, said the Court, 'plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S. at 363, 90 S. Ct. at 1072. At the same time by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.*, at 372, 90 S. Ct. at 1076 (Harlan, J., concurring).
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all respects free of juror bias and partiality. See Sixth Ground for Relief, supra.

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard [*198] to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. Under Winship . . ., it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court.

. . . .

After Winship the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, the relevant question is whether, after viewing the evidence in the light [*199] most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the

> trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant as been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.

Jackson, 443 U.S. at 315-19 (Citations and footnotes omitted.) Under the standard announced in Jackson, therefore, it is not the reviewing court's duty to rule out every hypothesis that might be conjured from the facts other than the petitioner's guilt. *Jackson*, 443 U.S. at 326, 99 S. Ct. at 2792-93. Instead, where the evidence supports conflicting inferences, the court must presume the factfinder resolved such conflicts against the petitioner and must defer to that resolution. *Id.* Moreover, circumstantial evidence [*200] may be sufficient to support a conviction. *United States v. Stone*, 748 F.2d 361, 363 (6th Cir. 1984). Finally, it is well established that the trier of fact at the state court level bears primary responsibility to choose which testimony or evidence to believe, and that a credibility determination by a state court is entitled to a presumption of correctness so long as the determination is fairly supported by the record. *Walker v. Engle*, 703 F.2d 959, 969-70 (6th Cir. 1983); *Scott v. Perini*, 662 F.2d 428, 435 (6th Cir. 1981); 28 U.S.C. § 2254(d).

Franklin argues that the "solitary piece of physical evidence" against him in the Strauss offenses was the fingerprint, identified as his, found on a champagne bottle that was in Strauss' apartment; that that print was difficult to lift and of minimal value; that there were other fingerprints found in the apartment and on the door that were not identified; that no blood evidence was found on any of Franklin's clothing even though all of his clothing was

confiscated by police; that jailhouse informant Larry Weaver's testimony was misconstrued; that Weaver testified to [*201] curry favor with prosecutors; that Franklin had a valid reason for giving police an alias when the officers came to arrest him; and that Michael Turnbolt's account of Franklin's activities on the night of the murder was improbable. (Amended Petition, Doc. No. 25 at 114-16.) As for the Winston burglary conviction, Franklin claims that his fingerprint found in Winston's apartment could have been left when Franklin was lawfully in the apartment; that the print was smudged; and that the police did not attempt to find any fingerprints near the window determined to have been the burglar's point of entry into Winston's apartment. *Id.* at 116.

Many of Franklin's arguments focus on the facts that are not present in the record, e.g., the identity of whoever left the unidentified fingerprints in Strauss' apartment, or the lack of blood on Franklin's clothes. This Court's review of a sufficiency-of-the-evidence claim, however, has nothing whatsoever to do with facts that are not present, and is quite strictly confined to facts that are not only present, but viewed in a light most favorable to the prosecution. Although most, if not all of Franklin's hypothetical suppositions could be dispelled [*202] by resort to the transcript of his trial,[10] this

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[10] For instance, Franklin claims his fingerprint in Rosha Winston's apartment could have been left at a time when he was lawfully in her apartment. Although Winston testified via deposition that Franklin had indeed been a guest in her apartment at some time, she also testified that she dusted her nicknacks every week, and that the burglary of her apartment took place three weeks after Franklin was last invited into her apartment. (Trial Tr. at 747.)

Court is not required to do so, and so declines to engage in that exercise.

The remainder of Franklin's arguments challenge the credibility of the witnesses who testified at his trial, to wit, Larry Weaver and Michael Turnbolt, or the relative weight to be given the fingerprint evidence introduced at trial. Viewing the testimony and fingerprint evidence in a light most favorable to the prosecution, therefore, the Court can do nothing but conclude that Franklin's convictions were supported by sufficient evidence. [*203]

Franklin's twelfth ground for relief should be denied.

Thirteenth Ground for Relief

In his thirteenth ground for relief, Franklin claims he was deprived of due process by the State's use of Larry Weaver's testimony at trial without the concomitant disclosure by the State that it had offered Weaver a deal in exchange for his testimony. In support of his claim Franklin directs the Court to the January 21, 1993, affidavit of Warren Coaston. (Return of Writ, Doc. No. 15, Exhibit W, Exhibit A therein.) There, Coaston stated that he was incarcerated with Weaver prior to Franklin's trial and that Weaver told Coaston he could "get a deal from the State" on his case if he "gave the prosecutor the same story [Weaver] gave." *Id.* Coaston also stated that he never testified at Franklin's trial although he did testify at the grand jury that Franklin had confessed to him, that the prosecutor told him he could get a bond reduction and "help" on his case in exchange for his grand jury testimony, and that he never heard Franklin confess to Strauss' murder. *Id.*

Franklin also relies on the affidavit of Robert Penebaker to support his claim that the prosecutors withheld impeachment [*204] evidence from the defense respecting Larry Weaver. Penebaker stated that he was in the Cincinnati

Justice Center with Franklin in 1988, and that Coaston circulated information he had gleaned from the media and "other sources" about Franklin's case. (Return of Writ, Doc. No. 15, Exhibit X, Exhibit GG therein.) Penebaker also stated that Weaver and Coaston were in contact with the prosecutor concerning Franklin's case, and that he himself had been threatened by the prosecutor because he refused to testify against Franklin. *Id.*

The Court finds neither of the documents relied upon by Franklin contradict Weaver's trial testimony that he was at that time under indictment on several charges or that the prosecutors had not made any promises to him or offers of leniency in exchange for his testimony against Franklin. (Trial Tr. at 1079, 1083.) The information in the Coaston and Penebacker affidavits is not *Brady* material, since it is neither exculpatory nor material nor would it have been useful as impeachment evidence against Weaver at Franklin's trial. Whatever Weaver may have said to Coaston is hearsay and consequently deserving of little evidentiary weight. Moreover, even if it [*205] is true that Coaston was offered leniency or a bond reduction in exchange for his testimony, it is a far leap to conclude that Weaver was also offered something of value in exchange for his, a leap this Court is unwilling to make. Coaston's affidavit does nothing to narrow the chasm between Franklin's claim that impeachment evidence was improperly withheld by the prosecution, and the documentation offered in support. Accordingly, Franklin's thirteenth ground for relief should be denied.

Fourteenth Ground for Relief

In his fourteenth ground for relief, Franklin contends the trial judge twice violated his right against self incrimination under the Fifth and Fourteenth Amendments to the United States Constitution by commenting (1) that there

were many times he wished a defendant would take the stand, and (2) that Franklin could have presented a particular witness, Stuart Richard Arnold, in the guilt phase of the trial rather than in the mitigation phase. Respondent counters that Franklin's claim is without merit, but does not claim that it has been procedurally defaulted.

In *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the [*206] United States Supreme Court held that comment on the failure of a defendant to testify at a criminal trial violated the Fifth Amendment prohibition against compelled testimony. Consequently, neither a trial court nor a prosecutor may directly or indirectly instruct or suggest to a jury that it may or should draw an inference of guilt from a defendant's decision not to testify. *Id.*; *Raper v. Mintzes*, 706 F.2d 161, 164 (6th Cir. 1983); *Butler v. Rose*, 686 F.2d 1163, 1170 (6th Cir. 1982). In the case of direct comments where there is manifest intent to prejudice the defense, reversal is mandated unless the error is proven to have been harmless beyond a reasonable doubt. *United States v. Ursery*, 109 F.3d 1129, 1133-35 (6th Cir. 1997); *Raper*, 706 F.2d at 164. If the comment was indirect, however, a more complex analysis is called for, one that requires a "probing analysis of the context of the comment, and the likely effect of the . . . court's curative instruction . . . ." *Ursery*, 109 F.3d at 1135 (quoting *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981)). Such an analysis [*207] involves consideration of the following four factors:

> (1) Whether the remark was manifestly intended to reflect on the failure of the defendant to testify;
>
> (2) Whether the remark was isolated or extensive;
>
> (3) Whether the case against the defendant was otherwise overwhelming; and

> (4) Whether curative instructions were given and when.

Ursery, 109 F.3d at 1135; *Hearn v. Mintzes*, 708 F.2d 1072, 1077 (6th Cir. 1983). Finally, the Court's inquiry "is not whether the jury possibly or even probably would view the remark in this manner, but whether the jury necessarily would have done so." *Ursery*, 109 F.3d at 1135 (citing *United States v. Garcia*, 13 F.3d 1464, 1474 (11th Cir. 1994)).

Franklin claims two different comments by the trial court individually and jointly amounted to a deprivation of his Fifth Amendment right to remain silent. The first of these was during voir dire after Juror Arthur had repeatedly expressed her belief that Franklin ought to prove his innocence. The judge stated as follows:

> It's time for the court to interrupt. Ms. Arthur, that's not the law, okay? I've sat [*208] here plenty of times with a jury and I said to myself it would be nice if this guy would tell what happened. That's not the law. He's not required to do that and he's not required to do anything. He comes in here cloaked with the presumption of innocence. As he sits here now, he's presumed innocent and under the Constitution he's not required to do anything at all.

(Trial Tr. at 248.) The second remark concerned the trial court's comment respecting Franklin's mitigation witness, Richard Arnold, during whose direct testimony the following exchange took place:

> Q: Is George the type of person, in your mind, that if he were incarcerated, in a manner of speaking, at least would benefit from it, be a person that could be rehabilitated, if you will,

based upon the nature of this case and based upon the nature of George?

. . . .

A: Yes, I think George is the type of person that would benefit from the rehabilitation that's offered him by the corrections system. I frankly, don't think George is the type of person, at least I've never seen any evidence in my dealings with George that would lead me to believe that George could kill anyone.

Prosecutor: Objection. [*209]

The Court: Objection is sustained. We're not here for that reason. The Jury's already determined innocence or guilt.

Defense: Judge, I recognize that, but I think he's entitled to relay his testimony about the history, nature and character of George Franklin.

The Court: The objection's sustained. [Mr. Arnold] was here throughout the trial and could have testified about that during the trial.

(Trial Tr. at 1352-53.) Defense counsel immediately requested a side bar conference and there made a motion for a mistrial based on the trial court's comment that Arnold could have testified during the guilt phase of Franklin's trial. *Id.* at 1353. The motion was denied. *Id.* Franklin argues that the first comment undermined his right to due process of law, and the second compounded the error.

The first comment by the judge, that he sometimes wished defendants would tell what happened, was at best an indirect comment on Franklin's right to decline to testify because the remark retrospectively referenced other defendants who may have appeared before the court in

previous cases. Thus, this Court must undertake the four-part "probing analysis of the context of the comment" [*210] to determine whether there has been a constitutional violation. *Spalla v. Foltz*, 788 F.2d 400, 404 (6th Cir. 1986).

First, the court's comment cannot be said to have "manifestly intended" to reflect on Franklin's (at that time, only anticipated) silence. At the time the comment was made, neither the jury, the prosecutor, the trial judge, nor perhaps even the defense knew whether or not Franklin would testify at his trial. In addition, the remark was an obvious response to Juror Arthur's repeatedly expressed belief that Franklin should prove his innocence. In fact, the remark Franklin finds most offensive, that being the judge's comment about sometimes having wished defendants would tell their story, was prefaced and followed by unequivocal statements that that was not the law. (Trial Tr. at 248.) Moreover, it is extremely unlikely that the jury would have necessarily have viewed the trial court's comment as manifestly intended to reflect on Franklin's possible future silence. *Ursery*, 109 F.3d at 1135 (citing *United States v. Garcia*, 13 F.3d 1464, 1474 (11th Cir. 1994)).

Although the evidence of Franklin's guilt was not such that [*211] it can be termed "overwhelming," the judge's comment that he sometimes wished defendants would tell their versions of events was isolated rather than extensive. Furthermore, "curative" instructions were given immediately following the trial court's illustration of what the law is not. Having examined the context of the trial judge's comment, this Court concludes that the comment does not implicate Franklin's right to be free from compelled self-incrimination.

Turning to the second comment by the trial judge, that being the one suggesting witness Arnold could have been called by Franklin during the guilt phase of trial, the Court finds the comment does not reflect on Franklin's right against

compelled self-incrimination. The court's remark followed witness Arnold's testimony during the mitigation phase that he could not conceive of Franklin committing a murder. The judge properly sustained an objection by the prosecution to Arnold's testimony. The court's comment reflected not on Franklin's silence, but on his calling witness Arnold during the mitigation phase of trial as opposed to the guilt phase in light of Arnold's testimony as to his perception of Franklin's ability to commit [*212] a murder. In Usery, the Sixth Circuit Court of Appeals rejected a claim that a prosecutor's comment violated a defendant's right against compulsory self-incrimination by surmising that the comment could have been construed by the jury as one highlighting the failure of the defense team to present the testimony of other witnesses, not the defendant himself. 109 F.3d at 1135. Similarly, the Court noted that general references to the uncontradicted nature of prosecution evidence may not reflect on the defendant's failure to testify where witnesses other than the defendant could have contradicted the evidence. *Raper v. Mintzes*, 706 F.2d 161, 164-165 (6th Cir. 1983). Thus, this Court finds the trial court's remark concerning the availability of witness Arnold during the guilt phase was not manifestly intended to reflect on Franklin's decision not to testify, nor would the jury have necessarily perceived it as doing so.

As noted above, the evidence against Franklin was short of overwhelming, but again the trial court's comment was isolated. No curative instructions were given, probably because none were needed; there was nothing to cure. Consequently, [*213] the second complained-of comment did not result in a violation of Franklin's right against compulsory self-incrimination.

Finally, the Court finds that even aggregated, the comments do not constitute an error of constitutional proportions.

Franklin's fourteenth ground for relief should be denied.

Fifteenth Ground for Relief

In his fifteenth ground for relief, Franklin argues that his Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution were violated by the trial court's failure to instruct the jury that it should infer nothing from the questions posed to them in voir dire concerning the death penalty. Although Respondent notes that the state courts rejected Franklin's claim on procedural grounds in post-conviction proceedings, he does not claim the issue has been procedurally defaulted, and instead asserts that it is without merit. Thus, this Court will address the merits of Franklin's claim.

It is true that the trial court did not instruct the venire in the way Franklin claims it should have. After the jury was empaneled and before any evidence was taken, however, the court instructed the jury that it "must not consider as evidence any [*214] statement of any attorney made during the trial," and that "[a] question, in and of itself, is not evidence and may be considered by you only as it supplies meaning to the answer." (Trial Tr. at 588-89.) Though not in the language urged by Franklin, the trial court conveyed the message to the jury that anything the attorneys say, whether it be a question or a statement, could not be considered as evidence of guilt. A reasonable juror would understand that the prohibition against considering the lawyers' utterances as evidence operated at all phases of the trial: voir dire, the guilt phase, and the mitigation phase. Thus, that the trial court used language other than that urged by Franklin does not rise to the level of a constitutional dimension. Accordingly, Franklin's fifteenth ground for relief should be denied.

Sixteenth Ground for Relief

In his sixteenth ground for relief, Franklin claims the state court of appeals' review of his death sentence was inadequate and in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. Respondent argues the issue has been procedurally defaulted.

Franklin first raised the instant [*215] claim in his state petition for post-conviction relief. The post-conviction trial court rejected the claim on the ground that errors in the appellate process are not amenable to post-conviction relief. The state court of appeals affirmed the trial court on the same ground, *State v. Franklin*, 1995 Ohio App. LEXIS 183, Nos. C-937060, B-8804127, 1995 WL 26281 at *4 (Ohio App. 1st Dist. Jan. 25, 1995)(unreported), and the Supreme Court of Ohio declined jurisdiction, *State v. Franklin*, 72 Ohio St.3d 1538, 650 N.E. 2d 479 (1995). Franklin next raised the instant claim in his Application for Delayed Reconsideration, arguing his appellate counsel were ineffective for their failure to raise the state court of appeals' inadequate review of his death sentence on appeal to the Ohio Supreme Court. (Return of Writ, Doc. No. 15, Exhibit DDD.) As noted above, Franklin's application was denied on timeliness grounds, a ground this Court in this case has found not to have been an independent and adequate state ground at the time Franklin's application was filed. In his Amended Petition, Franklin argues his appellate counsel were ineffective for their failure to raise errors in the state appellate [*216] court's judgment as error on appeal to the Ohio Supreme Court, a general allegation this Court construes as encompassing the issue presented in the present ground for relief. Consequently, there has been no procedural default of the issue, and it is amenable to merits review.

Franklin contends that the portion of the state appellate court's opinion purporting to review his death sentence is "replete with errors of both law and fact" which operated to

deny him meaningful, independent review of the jury's recommendation of a death sentence and the trial court's review of that recommendation. In his Traverse, he also contends that the appellate court used the wrong standard of proof in its review of Franklin's death sentence by not finding that the aggravating circumstance in his case outweighed the mitigating factors beyond a reasonable doubt.

Taking Franklin's second argument first, the Court observes that the complaint that the state court of appeals used the wrong standard in its reweighing of the aggravating circumstance against the mitigating factors is not borne out by the record. In its opinion, the court of appeals concluded that "the aggravating circumstance, as set forth [*217] in the death-penalty specification included in the verdict of the jury, outweighs, beyond a reasonable doubt, what little may be said to support the mitigation of Franklin's punishment." *State v. Franklin*, 1990 Ohio App. LEXIS 3385, No. C-890028, 1990 WL 117140 (Ohio App. 1st Dist. Aug. 15, 1990)(unreported)(emphasis added). Therefore, even assuming that Franklin's assertion that "beyond a reasonable doubt" is the correct standard, which, the Court notes is nowhere to be found in the statute governing state court appellate review of death sentences, *see* Ohio Rev. Code § 2929.05, the court of appeals applied that standard in reviewing Franklin's death sentence.

Franklin contends the state appellate court inappropriately noted that Strauss was killed in the condominium in which he and his fiancee intended to make a home. The Court observes, however, that the appellate court's comment was made in that part of the court's opinion laying out the factual background of the case, and not in the court's weighing of the aggravating circumstance against the mitigating factors present in Franklin's case. There is no indication that the state court of appeals was swayed [*218] one way or the other by the fact that Gerald Strauss and his

fiancee intended to make the condominium their home when the court engaged in its independent review of Franklin's death sentence. The same is true of the appellate court's erroneous assumption that the hammer believed to be the murder weapon was "wiped clean of any fingerprints," a statement that was not mentioned in the court's independent reweighing of the aggravating circumstance against the mitigating factors in Franklin's case.

Franklin also contends the state appellate court misstated the testimony of jailhouse informant Larry Weaver. True or not, it remains that the court discussed Weaver's testimony in its analysis of his third assignment of error to that court in which he argued his convictions were against the manifest weight of the evidence. In its independent review of Franklin's death sentence, the appellate court never mentioned Weaver's testimony. Thus, Franklin's claim that the court improperly relied on a misunderstanding of Weaver's testimony in its review is unfounded.

Next, Franklin argues that the court of appeals used the wrong standard in reviewing an assignment of error in which he claimed prejudicial [*219] and gruesome photographs were admitted into evidence at trial. This argument is unrelated to the court's weighing of the aggravating circumstance against the mitigating factors, and again, the court never mentioned the photographs in its reweighing discussion.

Franklin contends that the court of appeals also improperly weighed the aggravating circumstance in his case against each mitigating factor individually rather than cumulatively as the law requires. After a close reading of the court of appeals' opinion, however, this Court is convinced that the appellate court may have discussed each mitigating factor and its relative value as such individually, but in its conclusion, the court held as follows:

> Accordingly, after reviewing all the factors required by the law . . . we hold, in sum, that the aggravating circumstance, as set forth in the death-penalty specification included in the verdict of the jury, outweighs, beyond a reasonable doubt, what little may be said to support the mitigation of Franklin's punishment.

State v. Franklin, 1990 Ohio App. LEXIS 3385, No. C-890028, 1990 WL 117140 at *11 (Ohio App. 1st Dist. Aug. 15, 1990). That language indicates that the court did [*220] weigh the aggravating circumstance against the aggregate of the mitigation evidence, Franklin's contention to the contrary notwithstanding.

Franklin next asserts that the state court of appeals' review was insufficient because it was too limited, focusing on whether Franklin's death sentence was proportionate, and was skeletal as it encompassed only a single sentence. In *Scott v. Anderson*, 58 F. Supp.2d 767, 797-98 (N.D. Ohio 1998), reversed in part on other grounds, *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), however, the district court noted that "when a state appellate court expressly states that it has conducted a proportionality review, this court may not assume that the review was inadequate (or did not really occur) merely because the state court did not describe in writing all aspects of its review." Thus, Franklin's claim is unavailing.

Franklin's final contention in his sixteenth ground for relief relates to the state appellate court's reference in its opinion to the "aggravating circumstances," in Franklin's case. Franklin argues he was prejudiced by the court's use of the plural form when only one aggravating circumstance was present [*221] in his case. The cited reference to the plural form of the word circumstance, however, occurred in the appellate court's general discussion of what Ohio Rev. Code

§ 2929.05 requires an appellate court to do when presented with an appeal from a capitally-sentenced offender. In addition, this Court counts seven instances where the court of appeals referred to a single aggravating circumstance in its discussion of the actual reweighing engaged in by the court. *State v. Franklin*, 1990 Ohio App. LEXIS 3385, No. C-890028, 1990 WL 117140 at *10-11 (Ohio App. 1st Dist. Aug. 15, 1990). The only reference to "circumstances" in that discussion is the court's recitation of the requirement that the "nature and circumstances of the offense" be considered only as mitigating evidence. 1990 Ohio App. LEXIS 3385, [WL] at *10.

This Court finds none of the claimed errors in the state court of appeals' reweighing of the aggravating circumstance against the mitigating factors in Franklin's case, considered both individually and cumulatively, demonstrate a violation of any of Franklin's federal constitutional rights. Accordingly, it is the Court's recommendation that Franklin's sixteenth ground for relief be denied. [*222]

Moreover, having found no constitutional error cognizable in habeas corpus, the Court further concludes that Franklin's appellate counsel were not ineffective for not having raised the issue presented as error on direct appeal in the state courts. Thus, to the extent Franklin's first ground for relief relied upon this issue as one that underlies his ineffective assistance of appellate counsel claim, his first ground for relief should also be denied.

Seventeenth Ground for Relief

In his seventeenth ground for relief, Franklin argues that the alleged *Brady* violations that form the basis for his eighth ground for relief resulted in what he calls "state-induced ineffective assistance of counsel." Having rejected Franklin's claim that any of the allegedly withheld documents were *Brady* material, the Court similarly rejects

the notion that by withholding those documents the State rendered Franklin's trial counsel unable to effectively represent their client. The Magistrate Judge recommends that Franklin's seventeenth ground for relief be denied.

Eighteenth Ground for Relief

In his eighteenth ground for relief, Franklin claims six jurors who served on his jury [*223] should have been discharged due to their bias. Respondent does not argue the claim has been procedurally defaulted, but rather that it is without merit.

Franklin contends two jurors, Sikorski and Griffin, should have been excused because they exhibited a predisposition to impose the death penalty. "The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985)(internal quotation marks omitted). Although a prospective juror's bias need not be proved with unmistakable clarity, there will be times when the trial judge is "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law," and the trial judge's resulting determination is entitled to deference from reviewing courts. *Id.* at 425-26. On habeas corpus review, the court's focus is on "whether the trial court during the voir [*224] dire prevented the empaneling of an impartial jury." *Jamison v. Collins*, 100 F. Supp.2d 647, 699 (S.D. Ohio 2000)(citing *Hill v. Brigano*, 199 F.3d 833, 844 (6th Cir. 1999); *Wainwright*, 469 U.S. at 423).

First, Franklin argues that Juror Sikorski indicated during voir dire that a defendant should be executed anytime he or she has taken a life. The record belies Franklin's

assertion. Instead, Juror Sikorski stated that although he guessed he "leaned to the right" as far as the death penalty was concerned, and personally felt that in a premeditated or vicious and premeditated murder the death penalty might be justified, he also expressed an understanding that emotion and personal views were to be subordinated to the facts presented in the courtroom. (Trial Tr. at 484-85, 497.) Juror Sikorski did not consider a person being killed by hammer blows to the head to be a vicious murder, however. *Id.* at 499. Sikorski indicated he understood that in some cases the death penalty is entirely appropriate, and in others it is not. *Id.* at 485-86. He agreed that, if selected, he would listen to the evidence put forth [*225] to first determine whether Franklin was guilty. *Id.* at 499. Sikorski acknowledged that even if Franklin were determined by the jury to be guilty of aggravated murder, there would still be choices to make concerning the appropriate punishment, and he expressed a willingness to consider the mitigating evidence before forming an opinion as to what that punishment should be. *Id.* at 504. When asked if he would be leaning toward the death penalty before hearing any mitigation evidence, Sikorski indicated that if the conclusion that Franklin were guilty was "with no doubt," he "might be" leaning toward the death sentence. *Id.* at 505. He agreed that a life sentence with no possibility for parole for twenty or thirty years was "very severe." *Id.* at 506. At the conclusion of his voir dire, Sikorski stated he knew of no reason why he should not sit on Franklin's jury, and that he could be a fair and impartial juror. *Id.*

The totality of Juror Sikorski's voir dire does not support Franklin's claim. Taking his voir dire as a whole, this Court cannot say that Sikorski "strongly favored the death penalty in all cases" as Franklin [*226] contends, nor can the Court conclude that Sikorski's views prevented or substantially impaired his performance of his duties as a juror

in accordance with the trial court's instructions and his oath, or that his service destroyed the impartiality of the jury. Moreover, the record demonstrates that Sikorski was well aware that any personal feelings he had concerning the death sentence were to be put aside, and that Franklin's guilt and punishment were to be decided based solely on the evidence presented during the two phases of his trial.

To the extent that Franklin's seventeenth ground for relief claims Sikorski's service on the jury deprived Franklin of his right to an impartial jury, the Magistrate Judge recommends it be denied.

Next, Franklin argues that Juror Griffin exhibited a "near predisposition" for the death penalty where a guilty verdict was returned. Griffin expressed confidence that she could return a death sentence "if the circumstances warrant it," and acknowledged that her opinion on the death penalty has "jumped back and forth for and against it." (Trial Tr. at 209-10.) Griffin explained that she believed the death penalty was appropriate in a case where the victim [*227] had been killed "in cold blood" with no opportunity to defend himself, *id.* at 213, but did not agree that everyone who commits a murder should be put to death, *id.* at 215. Although Griffin was unaware that the death penalty was not an automatic sentence after a guilty verdict in aggravated murder cases, she stated she would be willing to consider a life sentence with no chance for parole for twenty or thirty years should the jury reach the penalty phase of trial in Franklin's case. *Id.* at 217. She denied any finding of guilt by the jury would cause her to believe Franklin should be sentenced to death, and stated she could keep an open mind in the penalty phase. *Id.* at 219, 220.

The meat, if it can be called that, of Franklin's claim that Griffin possessed a "near predisposition" in favor of the death penalty appears to be her candid but tentative

acknowledgment that she was unaware that a death sentence was not automatic for all convicted of aggravated murder. *See id.* at 217. When Griffin's voir dire is considered in its entirety, however, any significance that statement may have possessed is diluted to the point where it becomes innocuous. Throughout her voir [*228] dire, Griffin repeatedly expressed a willingness to keep an open mind respecting both guilt and punishment. Consequently, to the extent Franklin's eighteenth ground for relief claims Juror Griffin's views on the death penalty prevented or substantially impaired performance of her duties as a juror, it fails.

Next, Franklin contends Juror Siemer should have been excused from the jury because he stated he had checked with several priests prior to his voir dire concerning the Catholic Church's position on the death penalty. The subject initially came up when the court inquired of Siemer about his positive answer to the question whether he had any religious or ethical principles or scruples that would affect his ability to serve as a fair and impartial juror. (Trial Tr. at 378-79.) Siemer explained that he suspected the case might involve the death penalty and that at the time he completed the jury questionnaire where the question was presented to him, he was not knowledgeable about the Catholic Church's stand on the death penalty. *Id.* at 379. After checking into it, however, he learned that the Church did not oppose the death penalty in cases where it was warranted. *Id.* Siemer [*229] unequivocally stated he could follow the court's instructions on the law and fairly consider imposing the death sentence, and described his personal position on the death penalty as being "in the middle" both before and after consulting with the priests. *Id.* at 380, 390. Juror Siemer expressed confidence that he could deliver whatever verdict was required by law even if his personal view would propel him to a different verdict. *Id.* at 385. In addition, he stated his mind would be clear and strong enough to unhesitatingly

make the penalty decision should that become necessary, and that he would not "give in" to the other eleven jurors if he did not agree with them. *Id.* at 392-93.

The Court finds Franklin's claim that Juror Siemer was biased unfounded. Although Siemer did check with priests to learn the Catholic Church's position on the death penalty, he stated without equivocation that his new knowledge reinforced his previously-held views on the death penalty as being appropriate in some cases and not in others. Franklin's argument that he was entitled to be judged on the facts and law, free of "outside influences" is itself not supported by the law, since jurors are expected [*230] to use their own common sense and judgment in reaching a verdict. Those human abilities, too, could conceivably be considered "outside influences." Jurors are not required to leave their beliefs and entire life experiences outside the courtroom door. The purpose of voir dire is to ferret out those jurors whose beliefs and experiences handicap their ability to be fair and impartial. It is true that Siemer was not a completely blank slate when he sat as a juror in Franklin's trial. But no juror is; indeed no human adult is. The record contradicts Franklin's assertion that Siemer was biased because he checked his Church's views on the death penalty prior to his service. To the extent that Franklin's eighteenth ground for relief claims to the contrary then, it should be denied.

The next juror alleged by Franklin to have been biased is Juror Jessen. Franklin claims she could not agree to follow the law and weigh the mitigating factors because she did not know what the mitigating factors in Franklin's case were. Jessen never stated she could not agree to follow the law. To the contrary, she said she could follow the trial court's instructions and fairly consider imposing the death sentence. [*231] (Trial Tr. at 308.) In addition, when asked if she would keep an open mind and listen to any mitigating factors, she merely replied that she would like to have a

definition of mitigating factors. *Id.* at 315. Moreover, she stated she believed the death penalty was appropriate in some cases and not in others, and acknowledged that she would be able to consider a life sentence with no possibility of parole for twenty or thirty years as an alternative to the death penalty. *Id.* at 312-13, 316. Consequently, Franklin's claim that Juror Jessen was unable or unwilling to follow the law in determining Franklin's fate is unfounded.

Finally, Franklin argues that two jurors, Arthur and Bostic, were "substantially affected" by the violent nature of the murder. The basis for Franklin's claim as it relates to Juror Arthur is that Arthur stated gruesome evidence would make her angry. While Arthur did state that she would get "mad" over the cold-blooded murder of an innocent person, she stated there was "no reason at all" why she could not look at the pictures or videotapes of the murder scene in Franklin's trial. (Trial Tr. at 235.) Later, she agreed that any anger she might feel about the [*232] crime having been committed at all should not be directed toward Franklin, him being the only person in the courtroom over whom Arthur would have any control. *Id.* at 243. That statement can quite easily be understood to mean that Arthur would keep her anger from influencing her duties as a juror in Franklin's trial. Consequently, although this Court has found Arthur was a biased juror on other grounds, insofar as Franklin claims she was biased because she would become angry that a murder had taken place, his claim is unavailing.

As for Juror Bostic, Franklin contends she was biased because she stated she was bothered by the sight of blood. On the page referenced by Franklin where Juror Bostic's comment is claimed to appear, however, Bostic stated that the sight of her own blood causes her to get a little shakey, but that "other people's blood doesn't affect me." (Trial Tr. at 430.) Bostic went on to state that she did not think viewing the photographs and videotape of the deceased Strauss would

affect her. *Id.* at 430-31. Thus, Franklin's to the extent that Franklin claims Bostic was so repulsed by the sight of blood that she was unable to fairly and impartially fulfill [*233] her duties as a juror in his case, his claim fails.

In sum, the Court concludes none of the six jurors alleged in the instant ground for relief to have been so biased that they deprived Franklin of his constitutional right to a fair and impartial jury were so. Accordingly, the Magistrate Judge recommends that Franklin's eighteenth ground for relief be denied.

Nineteenth Ground for Relief

In his nineteenth ground for relief, Franklin contends the trial court erred in refusing his request that the jury be instructed on the offenses of murder and involuntary manslaughter. Franklin argues he was entitled to the requested instructions because the evidence produced at trial was susceptible to the reasonable interpretation that he was too intoxicated to form the requisite intent to commit aggravated murder.

Respondent claims Franklin procedurally defaulted the instant ground for relief. In support, Respondent cites the post-conviction trial court's determination that the claim was barred by the doctrine of res judicata. The state court of appeals left the trial court's finding undisturbed, and the state supreme court declined jurisdiction. The claim next was presented in [*234] Franklin's Application for Delayed Reconsideration. Having found that the ground relied upon by the state court of appeals in denying Franklin's application was not an independent and adequate state ground at the time Franklin filed his application, this Court must address the merits of the instant claim to the extent it has been preserved by its presentation in the Application for Delayed Reconsideration. That is, Franklin, via his Application for Delayed Reconsideration, has preserved the

ineffective assistance of appellate counsel claims presented therein. The underlying claim presented here, however, is not preserved via that mechanism and can only be addressed insofar as it provides a basis for Franklin's ineffective assistance of appellate counsel claim.

In Franklin's case, the post-conviction trial court's finding that the instant ground for relief was barred by the doctrine of res judicata results in its being procedurally defaulted for habeas purposes. Had the state court of appeals found Franklin's ineffective assistance of appellate counsel claims meritorious, the claims underlying the ineffective assistance of appellate counsel claims would have been resurrected for [*235] resolution in a new direct appeal at the state level. In that situation, the underlying claims would then be amenable to habeas review on their merits if the petitioner proceeded to federal court. That did not happen here, however, so in this Court, only Franklin's claim that his appellate counsel were ineffective has been preserved. Should the Court find Franklin's ineffective assistance of appellate counsel claim meritorious, it will address whether Franklin's appellate counsels' ineffectiveness constitutes cause for his failure to raise the underlying claim at the appropriate time in the state courts, and if so, whether Franklin has demonstrated prejudice therefrom. If the answer to that two-pronged question is "yes," then the Court will be able to reach the merits of Franklin's underlying claim. If it is "no," the underlying claim is not amenable to a merits review in a habeas proceeding.

Upon close scrutiny of Franklin's Amended Petition for Writ of Habeas Corpus, however, the Court finds Franklin has not raised the ineffectiveness of his appellate counsel's performance on the ground that appellate counsel failed to raise as error on direct appeal the trial court's refusal to [*236] instruct the jury on murder and involuntary manslaughter. Because Franklin does not claim his appellate

counsel were ineffective for not raising the underlying claim on direct appeal, this Court has no legitimate way to reach the merits of Franklin's nineteenth ground for relief, and recommends that it be denied.

Twentieth Ground for Relief

In his twentieth ground for relief, Franklin sets forth five alleged infirmities in the trial court's guilt-phase jury instructions, claiming they individually and collectively violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. As in the prior ground for relief, Respondent argues Franklin has procedurally defaulted his claim.

Franklin first raised the instant claim as his thirteenth ground for relief in his petition for post-conviction relief in the state court. The post-conviction trial court rejected the claim on res judicata grounds and also because the claim presented no constitutional issue. (Return of Writ, Doc. No. 15, Exhibit DD at 7.) On appeal from the trial court's decision, however, instead of relying on the state procedural rule cited by the trial court, the state [*237] court of appeals held that the evidence outside the record submitted by Franklin was irrelevant to the asserted claim and therefore did "not meet the minimum level of cogency required to support the claim[]." *State v. Franklin*, 1995 Ohio App. LEXIS 183, Nos. C-93-760, B-88904127, 1995 WL 26281 at *6 (Ohio App. 1st Dist. Jan. 25, 1995). The Ohio Supreme Court declined jurisdiction. *State v. Franklin*, 72 Ohio St.3d 1538, 650 N.E.2d 479 (1995). The appellate court is the last state court to have considered the instant claim, therefore, and that court did not rely on a state procedural rule in rejecting Franklin's claim. Consequently, this Court is free to address the merits of Franklin's claim that the trial court's charge to the jury was improper.

Franklin also raised a claim in his Motion to Recall the Mandate and Permit Supplemental Briefing arguing that his appellate counsel were ineffective for failing to raise the jury instruction issue as an assignment of error on direct appeal (Return of Writ, Doc. No. 15, Exhibit N) and in his Application for Delayed Reconsideration, again, as an underlying claim to his contention that his appellate counsel were ineffective for not [*238] having assigned as error the complained-of jury instructions (Return of Writ, Doc. No. 15, Exhibit DDD, Assignment of Error XI therein). For the reasons previously given, the ineffective assistance of appellate counsel claim is also subject to a merits review in this Court.

Franklin's first argument concerning the propriety of the jury instructions in the guilt phase of his trial relates to the trial court's alleged instruction on the civil standard of foreseeability during the guilt phase of the trial. Franklin contends those instructions were erroneous where the offense charged requires specific intent. According to Franklin, the improper instruction on foreseeability lessened the State's burden of proof on the intent element.

This Court observes, however, that the objected-to portion of the jury instructions was included in the trial court's instruction on the causation element of the aggravated murder offense, not, as Franklin implicitly contends, as part of the instruction on the intent element. Moreover, arguments similar to Franklin's have been rejected by the Sixth Circuit Court of Appeals in *Campbell v. Coyle*, 260 F.3d 531, 557 (6th Cir. 2001), and *Byrd v. Collins*, 209 F.3d 486, 527 (6th Cir. 2000). [*239] As was true in Byrd, immediately prior to the instruction on causation that included the "foreseeability" language, the trial court informed the jury that "no person may be convicted of aggravated murder, unless he is specifically found to have intended to cause the death of another." (Trial Tr. at 1263.) Thus, this Court reaches the

same conclusion as the Sixth Circuit, that the trial court's instruction "was not even an erroneous instruction, much less an unconstitutional one." Byrd, 209 F.3d at 527.

Franklin also claims the trial court's definition of "purpose" created an arguably rebuttable but mandatory presumption respecting the scienter element of aggravated murder by instructing the jury that "the purpose with which a person does an act or brings about a result is determined from the manner in which it was done, the means or weapon used and all the other facts and circumstances in evidence." (Trial Tr. at 1262.) An instruction creates a mandatory presumption when it requires the jury to infer a presumed fact if the state proves certain predicate facts and if the presumed fact is an essential element of the offense charged. *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). [*240] In determining whether there was a mandatory presumption created, the jury charge must be considered in its entirety. *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973). Thus, the question for this Court "whether the jury charge considered as a whole advised a reasonable juror that the prosecution had the burden of proof of the essential elements of the crime of aggravated murder according to Ohio law." *Clark v. Jago*, 676 F.2d 1099, 1102 (6th Cir. 1982).

Franklin contends that the trial court's instruction that "'purpose is determined' from the use of a weapon" created a mandatory presumption by relieving the prosecution of the burden of proof on the scienter element of the aggravated murder charge. In order to fairly assess Franklin's claim, however, it is necessary to flesh out the snippet of the instructions quoted in his argument. The court charged the jury as follows:

> Now the purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.
>
> So, the purpose with which a person does an act or brings about a result is determined from the [*241] manner in which it was done, the means or weapon used, and all the other facts and circumstances in evidence.
>
> However, if a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life or inflict great bodily harm, the purpose to kill may be inferred from the use of the weapon.
>
> . . . .
>
> Now, no person may be convicted of aggravated murder, unless he is specifically found to have intended to cause the death of another.

(Trial Tr. at 1262-63.) In addition, the jury was instructed that Franklin would have to be acquitted unless the State produced evidence that convinced the jurors beyond a reasonable doubt of every essential element of the crime charged in the indictment. *Id.* at 1259-60. Where the trial court instructed the jury on inferences, moreover, they were explained as permissive in nature. *Id.* at 690-91. Placed in context, the objected-to segment of the jury instructions did not create a mandatory presumption respecting the scienter element of aggravated murder. Thus, insofar as Franklin claims he is entitled to habeas relief on that ground, it should be denied.

Also with regard to the instruction on "purpose," Franklin [*242] argues that the trial court gave two incongruent definitions for "purpose": one that applies to specific intent offenses, and a second that is applicable only

to strict liability offenses.[11] The instructions of which Franklin speaks are, first:

> Purpose to cause death is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to kill Gerald R. Strauss while the defendant was committing aggravated burglary.

(Trial Tr. at 1261-62), and second:

> A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, if it is his specific intention to engage in conduct of that nature.

(Trial Tr. at 1262.) Neither instruction is unconstitutional under the federal constitution, however.

[*243]

In *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S. Ct. 1676, 1687-88, 95 L. Ed. 2d 127 (1987), the Supreme Court

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[11] Although Franklin's appellate counsel raised the inadequacy of the trial court's jury instruction on the "purpose" element on direct appeal, aside from the mention of the federal constitution in the heading for the relevant assignment of error, counsel did not contend the instructions violated Franklin's federal constitutional rights, and argued instead that the jury instructions were contrary to Ohio law. (Return of Writ, Doc. No. 15, Exhibit B at 65-66.) Thus, Franklin's sub-claim here respecting the "purpose" instruction was not preserved for habeas review independent of his ineffective assistance of appellate counsel claim.

held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state." The Court went on to state that "only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill, and we do not find this minority position constitutionally required." *Id.* at 158. Although *Tison* was decided in the context of capital sentencing, this Court divines no reason to set a higher standard respecting scienter instructions in the guilt phase of a trial than in the sentencing phase. Thus, to the extent that Franklin challenges his aggravated murder conviction on the basis of the trial court's instructions on "purpose," the instant ground for relief should be denied.

Next, Franklin argues that Ohio's statutory definition of reasonable doubt is unconstitutional. Against a similar challenge, the Sixth Circuit observed that "this Circuit has previously [*244] upheld the constitutionality of this instruction." *Byrd v. Collins*, 209 F.3d 486, 527 (6th Cir. 2000)(citing *Thomas v. Arn*, 704 F.2d 865, 869 (6th Cir. 1983).

Finally, Franklin contends the trial court erred in its preliminary instruction to the jury on the capital specification with which he was charged. Franklin argues that the trial court erroneously omitted that portion of the specification instructions that informed the jury it must find Franklin was either the principal offender in Strauss' murder, or that the murder was committed by Franklin with prior calculation and design. After all the evidence was taken in the guilt phase of Franklin's trial, however, the court instructed the jurors as follows:

> If you find the defendant is guilty of aggravated murder, it is your duty to deliberate further and

decide an additional factual question, that is the specification of aggravating circumstances as set forth in Count One of the indictment. You will continue your deliberations as to whether or not the state proved, beyond a reasonable doubt, that the defendant is guilty of the specifications. If you find the defendant is not guilty of aggravated [*245] murder, you will not consider or decide this additional question.

Now the aggravating circumstances set forth in the specification of the first count of the indictment includes a separate and distinct matter. You must consider the specification and the evidence applicable to it separately and you must state your findings to it uninfluenced by your decision as to any other count.

Your decision on the specification will be expressed by a finding of guilty or not guilty as to that separate specification.

Now, what is the specification? The state charges in the specification to Count One that the defendant, George T. Franklin, as the principle [sic] offender, committed the offense of aggravated murder of Gerald R. Strauss while the defendant was committing the offense of aggravated burglary.

The term principle [sic] offender means the one who personally performs every act constituting the offense, in this case aggravated murder.

. . . .

If you find that the state proved beyond a reasonable doubt all the essential elements of the aggravating circumstances contained in the

> specifications to Count One, your finding must be gu[illegible]s to that specification. [*246]
>
> However, if you find that the State failed to prove any one of the essential elements of the aggravating circumstances contained in the specification to count one, your finding must be not guilty as to that specification.

(Trial Tr. at 1271-73.) Thus, the jury was fully and properly instructed that in order to find Franklin guilty of the capital specification, it must conclude beyond a reasonable doubt that Franklin was the principal offender in the murder of Gerald Strauss. The Court notes that the instructions quoted above were given to the jury just before it retired to deliberate, and were freshest in the jury's mind when it was determining Franklin's guilt. Franklin has not demonstrated that the abbreviated preliminary instruction on the death specification "so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973); *Buell v. Mitchell*, 274 F.3d 337, 365 (6th Cir. 2001). For that reason, and because the jury was properly instructed on the elements of the capital specification just prior to their deliberations, the Magistrate Judge recommends [*247] denial of the instant ground for relief on the final sub-claim asserted by Franklin.

In sum, the Court finds no merit to Franklin's contentions that the jury instructions given by the trial court unconstitutionally deprived him of a fair trial. Accordingly, Franklin's twentieth ground for relief should be denied. In addition, this ground for relief provides no basis for a finding that Franklin's trial and appellate counsel were ineffective for their failure to raise the jury instruction issue in the state courts. To the extent that Franklin's first and second grounds for relief so contend, therefore, they too should be denied.

Twenty-first Ground for Relief

In his twenty-first ground for relief, Franklin claims, but does not demonstrate, that prejudice of a constitutional dimension resulted from the trial court's failure to record his arraignment and all bench conferences. Respondent argues that Franklin procedurally defaulted his claim by raising it for the first time in his petition for post-conviction relief in the court of common pleas, where it was rejected on res judicata grounds. That decision was affirmed by the court of appeals on the same grounds, and on [*248] the alternative ground that the claim presented no issue of a constitutional dimension. *State v. Franklin*, 1995 Ohio App. LEXIS 183, Nos. C-930760, B-8804127, 1995 WL 26281 (Ohio App. 1st Dist. Jan. 25, 1995)(unreported). The state supreme court declined jurisdiction. *State v. Franklin*, 72 Ohio St.3d 1538, 650 N.E.2d 479 (1995).

The Court observes that the instant claim is in the same procedural posture as Franklin's nineteenth ground for relief, and that it is consequently amenable to habeas review to the extent that Franklin claims his appellate counsel were ineffective for not raising the issue as error on direct appeal.

Under Strickland, Franklin must show both deficient performance of his counsel and prejudice therefrom in order to prevail on his ineffective assistance of appellate counsel claim. 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052. Here, Franklin's entire argument on the prejudice prong is as follows:

> In this case, there was an incomplete record of the proceedings, making the constitutionally required review of his sentence impossible. For example, the record on direct appeal did not include transcripts of the arraignment or bench conferences held during trial. [*249] As a result, the death sentence was subject to a flawed review

> at each level of the state proceedings and therefore cannot stand.

(Traverse, Doc. No. 50 at 217.) Franklin has produced no evidence to suggest what information in particular was exchanged or presented in the arraignment or bench conferences that would have potentially impacted the outcome of his trial or his direct appeal. As he has merely alleged prejudice rather than demonstrated it, he has not met his burden under Strickland, and his claim of ineffective assistance of appellate counsel neither succeeds on its own merit, nor demonstrates cause for not having raised the issue on direct appeal in the state courts. Accordingly, the Court recommends his twenty-first ground for relief be denied. Similarly, Franklin's first ground for relief claiming the ineffectiveness of his appellate counsel should be denied to the extent it relies on the instant ground for relief.

Twenty-second Ground for Relief

In his twenty-second ground for relief, Franklin claims "other acts" evidence was erroneously admitted during the guilt phase of his trial and that as a consequence, he was deprived of the protections guaranteed [*250] by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Although both parties seem to agree that the instant claim was first raised as "Claim B" on direct appeal, the Court observes that "Claim B" under Franklin's first assignment of error in his appellate brief challenges the constitutionality of the Ohio death penalty statutes, and is unrelated to the instant ground for relief. Moreover, the Court finds neither an assignment of error nor any argument on the current issue in Franklin's appellate brief, other than as "other acts" evidence related to his complaint that the trial court erred in not severing the Winston burglary from the Strauss offenses. This Court has dealt with that issue above.

In fact, the instant claim was first raised as Franklin's fifteenth claim for relief in his state post-conviction proceeding. (Return of Writ, Doc. No. 15, Exhibit W.) The trial court found it barred by the doctrine of res judicata, and the state court of appeals affirmed the trial court's judgment. (Return of Writ, Doc. No. 15, Exhibit DD); *State v. Franklin*, 1995 Ohio App. LEXIS 183, Nos. C-930760, B-8804127, 1995 WL 26281 (Ohio App. 1st Dist. Jan. 25, 1995). [*251] The Ohio Supreme Court declined jurisdiction. *State v. Franklin*, 72 Ohio St.3d 1538, 650 N.E.2d 479 (1995).

Franklin next raised the claim in conjunction with a claim that his appellate counsel were ineffective in his twenty-fourth assignment of error in his Application for Delayed Reconsideration. (Return of Writ, Doc. No. 15, Exhibit DDD.) As noted previously, the court of appeals relied on a procedural ground found above not to have been an adequate and independent state ground. Thus, to the extent that the claim has been preserved as an underlying claim for Franklin's ineffective assistance of appellate counsel claim, this Court may address its merits.

Franklin devotes one sentence in his Amended Petition to the current issue in his first ground for relief, in which he claims his appellate counsel were ineffective for, inter alia, their failure to raise as error on direct appeal the ineffectiveness of Franklin's trial counsel. He contends: "Defense counsel also failed to . . . request an instruction that 'other acts' evidence was not to be used as substantive evidence of Mr. Franklin's guilt." (Amended Petition, Doc. No. 25 at 42.) Franklin claims in the [*252] instant ground for relief that the admission of the "other acts" evidence was itself error of constitutional proportion. That claim differs from the claim underlying his ineffective assistance of appellate counsel claim, although the two claims are closely related. Because Franklin has not asserted the instant claim as one underlying his ineffective assistance of appellate counsel

claim in his first ground for relief, this Court cannot address its merits. Franklin's claim that his appellate counsel were ineffective for failing to raise trial counsel's ineffectiveness as error on appeal, based on trial counsel's failure to request jury instructions on the proper use of "other acts" evidence, is addressed in the Court's analysis of Franklin's first ground for relief.

The Magistrate Judge recommends Franklin's twenty-second ground for relief, and his first ground for relief to the extent it relies on the twenty-second, be denied.

Twenty-third Ground for Relief

In his twenty-third ground for relief, Franklin argues that three prospective jurors were improperly excused for cause, based on their opposition to the death penalty. Respondent asserts Franklin has procedurally defaulted [*253] his claim.

Franklin first raised the instant claim in his state petition for post-conviction relief. (Return of Writ, Doc. No. 15, Exhibit W.) The trial court rejected the claim on res judicata grounds and because it presented no constitutional question, (Return of Writ, Doc. No. 15, Exhibit DD), and that judgment was affirmed by the state court of appeals, *State v. Franklin*, 1995 Ohio App. LEXIS 183, Nos. C-93-760, B-8804127, 1995 WL 26281 (Ohio App. 1st Dist. Jan. 25, 1995). The Ohio Supreme Court declined jurisdiction. *State v. Franklin*, 72 Ohio St.3d 1538, 650 N.E.2d 479 (1995).

Franklin also raised the instant claim as one underlying his ineffective assistance of appellate counsel claim in his Application for Delayed Reconsideration, which was disposed of by the Hamilton County Court of Appeals on procedural grounds. (Return of Writ, Doc. No. 15, Exhibits DDD and GGG.) This Court has determined supra, however, that the grounds relied upon by the court of appeals did not

constitute an independent and adequate state ground under *Maupin*. Thus, the instant claim is amenable to habeas review only if the Court finds his preserved ineffective assistance of appellate [*254] counsel claim (1) meritorious, (2) cause for not having raised the underlying claim in the state courts, and (3) prejudicial.

Some examination of the merits of Franklin's underlying claim is necessary to determine whether his appellate counsel were ineffective for not having raised the claim on direct appeal. This need not detain the Court for long, however, because Franklin's argument is that the trial court erroneously applied the standard announced in *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), in dismissing three jurors who, by Franklin's own account, admitted their views on the death penalty would prevent or substantially impair the jurors' ability to carry out his or her duties in accordance with the law. Franklin asserts that the trial court should have applied the standard set forth in Ohio Rev. Code § 2945.25(C), which provides that a prospective juror in a capital case may be excused for cause if "he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death." The trial court, however, committed no error [*255] of a federal constitutional dimension by adhering to the standard set forth in Witt, and habeas corpus is appropriate only for correcting errors of that magnitude, not for correcting errors of state law.

The Court finds Franklin's claim meritless. Consequently, it is recommended that his twenty-third ground for relief be denied, and, to the extent that this ground undergirds Franklin's ineffective assistance of appellate counsel claim, that it be denied as well.

Twenty-fourth Ground for Relief

In his twenty-fourth ground for relief, Franklin argues that the introduction of a picture of Gerald Strauss in life, and the testimony of Karen Strain in which she described the marriage plans she and Strauss had made and stated that Strauss was involved with the Big Brothers program, including tutoring and taking his young charges on outings, was erroneous and prejudicial to Franklin's defense. Respondent claims Franklin has procedurally defaulted the instant ground for relief.

Franklin first presented the victim-impact issue in his state petition for post-conviction relief. The trial court rejected the claim on res judicata grounds, and the state court of appeals affirmed [*256] on the same ground. (Return of Writ, Doc. No. 15, Exhibit DD.) *State v. Franklin*, 1995 Ohio App. LEXIS 183, Nos. C-930760, B-8804127, 1995 WL 26281 (Ohio App. 1st Dist. Jan. 25, 1995). The Ohio Supreme Court declined jurisdiction. *State v. Franklin*, 72 Ohio St.3d 1538, 650 N.E.2d 479 (1995).

Next, Franklin presented the claim in his Motion to Recall the Mandate and Permit Supplemental Briefing. (Return of Writ, Doc. No. 15, Exhibit N.) That motion was denied by the Ohio Supreme Court. *State v. Franklin*, Case No. 90-1914, Ohio Supreme Court Docket No. 32, (February 20, 1992). Franklin also presented the same claim in his Application for Delayed Reconsideration as his thirteenth assignment of error (Return of Writ, Doc. No. 15, Exhibit DDD), which was also denied (Return of Writ, Doc. No. 15, Exhibit GGG).

With the exception of his post-conviction petition, Franklin has presented the instant claim in the state courts as one underlying his appellate counsels' ineffectiveness for not having raised the victim-impact issue on direct appeal. To that extent, then, it has been preserved, and this Court can only address the merits of the underlying claim if Franklin's

appellate [*257] counsel are found to have been ineffective on that basis, and if Franklin has shown prejudice resulting therefrom. Franklin has not carried that burden here.

In *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991), the United States Supreme Court held that "if the State chooses to permit the admission of victim impact evidence . . . the Eighth Amendment erects no per se bar." Admittedly, the Supreme Court uttered that holding in the context of a sentencing phase of a capital trial, but the Sixth Circuit Court of Appeals has confronted the same question in the guilt-phase context as well. *See Byrd v. Collins*, 209 F.3d 486, 532-33 (6th Cir. 2000). There, the Court of Appeals agreed with the district court's finding that a videotape of the victim and his family was relevant to a jailhouse informant's testimony that *Byrd* had confessed to the murder of his victim while watching the videotape as it was aired by a television station. *Id.* Although the introduction of the evidence respecting Strauss and his activities prior to his death was not connected to the defendant's guilt in the same way as the Byrd videotape [*258] was to Byrd's guilt, this Court is not concerned solely with the admissibility of the objected-to evidence. Rather, the Court must determine whether admission of that evidence rises to the level of a due process violation. That test is whether the evidence introduced was so unduly prejudicial that it renders the trial fundamentally unfair. Payne, 501 U.S. at 825.

Here, such is not the case. The testimony to which Franklin objects is completely contained in two pages of the nearly 1,500-page trial transcript. Moreover, the jury was instructed that sympathy should play no role in its determination of Franklin's culpability for Strauss' murder. (Trial Tr. at 687.) It is unlikely that the small amount of evidence introduced concerning Strauss' activities in life was so unduly prejudicial that it rendered Franklin's trial

fundamentally unfair in light of the other evidence of Franklin's guilt that was brought to light during his trial. Thus, the Magistrate Judge recommends Franklin's twenty-fourth ground for relief be denied. Likewise, the instant ground for relief provides no basis upon which to conclude that Franklin's appellate counsel were ineffective for not having [*259] raised the issue on direct appeal.

Twenty-fifth Ground for Relief

In his twenty-fifth ground for relief, Franklin claims his Sixth Amendment right to confront the witnesses against him was violated when inadmissible hearsay evidence was introduced during his trial. Specifically, Franklin argues that Officer Lueger's testimony that the burglar of the Winston residence had entered through a window prejudiced his defense, and that jailhouse informant Weaver's testimony relating the statements of another inmate, Hornsby, as to statements Hornsby heard Franklin make was similarly prejudicial.[12] Respondent contends Franklin procedurally defaulted his claim.

[*260]

Franklin first raised his claims concerning the alleged hearsay testimony of Officer Lueger and Weaver in his state post-conviction petition as his nineteenth claim for relief. (Return of Writ, Doc. No. 15, Exhibit W.) The post-conviction trial court denied Franklin's claim on res judicata

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[12] In his traverse, Franklin includes an allegation that Officer Hillard's testimony respecting the recovery of some placemats taken from the Strauss residence was also prejudicial hearsay. Since that argument is made only in Franklin's traverse, however, and because issues not presented in the petition may not be raised in the traverse, the Court will not address that part of Franklin's argument.

grounds and because it presented no substantial constitutional issue. (Return of Writ, Doc. No. 15, Exhibit DD.) The Court of Appeals for Hamilton County affirmed on the same ground, *State v. Lawson*, 1995 Ohio App. LEXIS 183, Nos. C-93-760, B-8804127, 1995 WL 26281 (Ohio App. 1st Dist. Jan. 25, 1995), and the Ohio Supreme Court declined jurisdiction, *State v. Franklin*, 72 Ohio St. 3d 1538, 650 N.E. 2d 479 (1995).

Next, Franklin raised the issue in his Application for Delayed Reconsideration as part of his twenty-second assignment of error, in which he contended his appellate counsel were ineffective for not raising the hearsay issue as error on direct appeal. (Return of Writ, Doc. No. 15, Exhibit DDD.) For the reasons already stated in previous grounds for relief, and to the extent that the ineffective assistance of counsel claim based upon the underlying hearsay issue has been preserved, [*261] therefore, this Court may address the merits of Franklin's claim.

Franklin first claims that Officer Lueger's testimony that there was discussion at the police department respecting the burglary of Rosha Winston's apartment, and that the burglar there had made his entrance through a window. Defense counsel objected twice to Officer Lueger's testimony, but both objections were overruled by the trial court. (Trial Tr. at 810-11.) This Court finds no error of a constitutional dimension in the trial court's determination that the officer's statements were not being offered for the truth of the matter asserted, to wit, that the burglar of the Winston home had gained entrance through a window. Indeed, even if that were not the case, there was direct evidence presented to prove that fact independent of Officer Lueger's testimony. Moreover, Franklin has not satisfied his burden of showing prejudice from the admission of Officer Lueger's statements.

Franklin next claims that jailhouse informant Larry Weaver's testimony concerning the content of Franklin's statements to another inmate, Hornsby, were violative of Franklin's Sixth and Fourteenth Amendment rights and that he suffered prejudice [*262] therefrom. Franklin asserts that Weaver testified about Hornsby's statements in which Hornsby claimed Franklin had made an admission respecting the Strauss murder. At trial, Weaver testified that he, Hornsby, Franklin, and "a few other guys" were incarcerated and congregated in "the lock-up or bullpen" in August of 1988. (Trial Tr. at 1074.) Weaver described the following conversation between him, Hornsby, and Franklin as follows:

> Q. (by prosecutor): Okay, now, what did Mr. Hornsby say?
>
> A. Mr. Hornsby said that Mr. Madison had testified against him at a trial.
>
> Q. Did he make any comment about what he'd like to do to Mr. Madison or whatever his name was?
>
> A. Yes, he did.
>
> Q. What was that?
>
> A. He said he'd like to get him.
>
> Q. Did Mr. Franklin make any comment at that time?
>
> A. He said, he told Hornsby, you said you would get hurt doing him, I already got one and one more wouldn't hurt no more.
>
> Q. He said he already got one and one more wouldn't hurt?
>
> A. Yes.
>
> Q. Then what occurred?

A. They talked for a minute about him and then somebody asked the guy about his shoes.

Q. You mean Mr. Franklin?

A. Yes.

Q. And what [*263] did he say about his shoes?

A. He said the police had taken them for investigation.

Q. Did he make any comment beyond that, about any property that was taken in this offense?

A. There was something he said to that effect.

Q. What did he say?

A. Whatever it was that they were looking for they wasn't going to get it back.

Q. They wasn't going to get it back?

A. Yes.

(Trial Tr. at 1076-77.) It is clear from the transcript that Weaver was not testifying as to what Hornsby told him Franklin had said to Hornsby, but that instead, Weaver had overheard Franklin's admission to Hornsby and the group, of which Weaver was a part. As such, Weaver's testimony is not hearsay under Ohio R. Evid. 801(D)(2), nor does admission of Weaver's testimony implicate the federal constitution.

The Court finds Franklin's arguments unavailing, and consequently recommends that his twenty-fifth ground for relief be denied. In addition, to the extent that Franklin claims his appellate counsel were ineffective for having failed to raise the instant ground for relief as error or direct appeal, that claim, too, is without merit.

Twenty-sixth Ground for Relief

In [*264] his twenty-sixth ground for relief, Franklin argues cumulative and prejudicially gruesome evidence was presented at his trial, depriving him of his right to a fair trial. Although Respondent contends Franklin procedurally defaulted this claim by presenting it in the state post-conviction proceedings, where the trial court and appellate court found it barred by the doctrine of res judicata, in reality Franklin first presented the claim on direct appeal in both the court of appeals and the Ohio Supreme Court. Each court addressed the issue on its merits, and it has consequently been preserved for review in these habeas corpus proceedings.

The evidence to which Franklin objects was described by the Ohio Supreme Court as follows:

> The questioned exhibits fall into three categories: on-scene still photographs, coroner's photograph and slides, and a videotape of the scene. The on-scene photographs depict blood, but no gaping wounds. Exhibit 28 is a photograph of the bloodstained bed and a ripped-out telephone. Exhibit 29 depicts most of the bedroom, including the bloodstained bed and a fraction of the body. Exhibit 30 shows the victim's body with blood but no wounds appearing. [*265] Exhibit 31 depicts the upper half of the body and part of the bed, and Exhibit 32 the head and upper chest. . . .
>
> Exhibit 33 profiles the entire body at the morgue. Exhibit 34-A shows the wound on the victim's head. 34-B and C show the wounds to the victim's face. 34-D, E and F are gruesome, showing the wounds on the back of Strauss's head. An additional slide, depicting the back of the head after the skin had been peeled back, was not shown to the jury. . . .

> Exhibit 40 is a fifteen-minute videotape that depicts the Strauss townhouse and grounds. The bedroom where Strauss was killed and the body itself are depicted for less than three minutes.

State v. Franklin, 62 Ohio St.3d 118, 125-26, 580 N.E.2d 1 (1991).

Both state courts addressing Franklin's claim of prejudice from the photographs, slides, and videotape found all such evidence properly admitted and concluded Franklin's right to a fair trial was not implicated. The standard for federal review of such decisions by state courts was set forth in *Jamison v. Collins*, 100 F. Supp. 2d 647, 702, 704 (S.D. Ohio 2000), as follows:

> A federal court's review of state court evidentiary [*266] rulings on a petition for habeas corpus [] is limited to a determination of whether the error, if any, was of such magnitude as to deny petitioner his right to a fair trial.[] *Futch v. Dugger*, 874 F.2d 1483, 1487 (11th Cir. 1989)(quoting *Osborne v. Wainwright*, 720 F.2d 1237, 1238 (11th Cir. 1983))(quoting *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982)). Since "federal habeas corpus relief does not lie for errors of state law", [*sic*] *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), erroneous evidentiary rulings do not violate the United States Constitution in and of themselves. *Dennis v. Mitchell*, 68 F. Supp. 2d 863, 892 (N.D. Ohio 1999). Instead, the evidence "must be inflammatory or gruesome, and so critical that its introduction denied petitioner a fundamentally fair trial." *Futch*, 874 F.2d at 1487. Therefore, the critical issue is "whether the claimed error was so egregious as to have

> nullified the legitimacy of the properly admitted substantive evidence of the [petitioner's] guilt." *Dennis*, 68 F. Supp.2d at 892-93 [*267] (citing Lewis, 497 U.S. at 780, 110 S. Ct. 3029; *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989)). . . . [Moreover,] "the balancing of relevance and prejudice is generally a state evidentiary issue which federal courts do not review." *Jones* [*v. Butler*], 864 F.2d [348,] 368 [(5th Cir. 1988)].

Here, the probative value of the photographs, slides, and videotape was found to outweigh any prejudice to Franklin by the trial court, appellate court, and the state supreme court. While this Court declines to determine whether, in its own judgment, the state courts' holdings were erroneous as an evidentiary matter, even if it were to do so, it would not conclude that the error was so egregious as to have nullified the legitimacy of the properly admitted substantive evidence of [Franklin's] guilt. Therefore, Franklin's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution were unaffected by the introduction of the photographic, slide, and videotape evidence at trial.

Franklin [*268] also claims that Officer Hillard's narration of the videotape as the video was being recorded prejudiced his defense because it included conclusory statements. In addition, Franklin argues that the trial judge's comments following the playing of the videotape for the jury exacerbated the prejudice he suffered from Officer Hillard's comments. This Court has viewed the videotape and listened to Officer Hillard's contemporaneous narration of the crime scene, and having done so, finds no error of constitutional magnitude from Officer Hillard's comments, especially when viewed in light of the trial court's cautionary instructions

immediately following the playing of the tape for the jury. Officer Hillard opined that a particular window in the Strauss apartment might have been the point of entry, and later in the video, an unidentified officer suggested that a hammer might have been the weapon used to inflict the wounds suffered by Strauss. The trial court instructed the jury that the jury was the sole factfinder as to those issues, and that the jurors should not accept the comments of Officer Hillard or the other officer when determining whether the window indicated was the one through [*269] which the perpetrator obtained entrance or whether Gerald Strauss' injuries were inflicted with a hammer. (Trial Tr. at 997-999.) Contrary to Franklin's assertion, the Court finds the trial court's cautionary instructions cured any prejudice Franklin might have sustained from Officer Hillard's and the other officer's comments in the videotape.

Accordingly, the Magistrate Judge recommends Franklin's twenty-sixth ground for relief be denied.

Twenty-seventh Ground for Relief

In his twenty-seventh ground for relief, Franklin presents an argument that the prosecutor engaged in misconduct in the voir dire, guilt, and penalty phases of Franklin's trial. Respondent counters that Franklin procedurally defaulted this claim by raising it for the first time in his state post-conviction proceedings, where the claims[13] were rejected on res judicata grounds. If that were the end of Franklin's pursuit of relief on the stated grounds,

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[13] Though presented as one ground for relief with three parts in his petition for a writ of habeas corpus in this Court, Franklin presented the prosecutor's alleged misconduct in the voir dire, guilt, and penalty phases of trial as three separate claims in his post-conviction proceedings.

this Court would agree with Respondent. Such is not the case, however.

[*270]

Following rejection of his claims in the post-conviction proceedings, Franklin next presented the claims of ineffective assistance of appellate counsel based on appellate counsels' failure to raise prosecutorial misconduct during the voir dire and penalty phases of trial in his Application for Delayed Reconsideration which he filed in the state court of appeals. (Return of Writ, Doc. No. 15, Exhibit DDD.) For reasons previously discussed, this Court has found the state court's denial of Franklin's Application was not based on a state procedural rule that was firmly established and regularly followed at the time Franklin filed the document.

After the court of appeals denied the requested relief, Franklin filed a Motion for Reconsideration in the Ohio Supreme Court. (Return of Writ, Doc. No. 15, Exhibit KKK.) In that motion, however, unlike the application filed in the state court of appeals, Franklin included the claim that his appellate counsel were ineffective for failing to raise *guilt-phase* prosecutorial misconduct as error on direct appeal. The Ohio Supreme Court denied Franklin's motion without explanation. (Return of Writ, Doc. No. 15, Exhibit MMM.) Thus, to determine [*271] whether Franklin has procedurally defaulted the instant claim, this Court must "look through" the Ohio Supreme Court's disposition to the last state court decision providing reasons for the decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L. Ed. 2d 706, 716 (1991); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991).

In doing so, however, this Court finds nothing to look back to. Franklin did not present an ineffective assistance of appellate counsel claim with guilt-phase prosecutorial misconduct as the underlying claim in his Application for

Delayed Reconsideration. In his Traverse and in reply to Respondent's claim of procedural default of this ground for relief, Franklin directs the Court's attention to Assignments of Error 14 and 16 of the Application. (Traverse, Doc. No. 50 at 229.) Those assigned errors, however, relate to the voir dire and penalty phases of Franklin's trial only, however, and the Court finds no other assignment of error in Franklin's Application presenting the ineffective assistance of appellate counsel/guilt-phase prosecutorial misconduct claim. Consequently, Franklin has procedurally defaulted that [*272] part of the instant claim. Thus, only the remaining claims involving alleged prosecutorial misconduct at the voir dire and penalty phases are amenable to merits review here, to the extent that they form the basis of his ineffective assistance of appellate counsel claim.

As summarized in *Jamison v. Collins*, 100 F. Supp.2d 647, 710-11 (S.D. Ohio 2000), the procedure for federal review of a prosecutorial misconduct challenge is as follows:

> For prosecutorial misconduct to rise to the level of a constitutional violation, a court must determine that the prosecutor's statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Hill v. Brigano*, 199 F.3d 833, 847 (6th Cir. 1999)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). When analyzing a claim of prosecutorial misconduct, the Sixth Circuit requires a district court to initially decide whether the challenged statements were improper. *Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). If improper, the district court next examines whether the statements were so [*273] flagrant as to constitute a denial of due process and thereby warrant the granting of a writ. *Id.* Flagrancy is

> discerned by considering: "'1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused.'" *Id.* (quoting *United States v. Francis*, 170 F.3d 546, 549-50 (6th Cir. 1999)).

Additionally, "allegations of prosecutorial misconduct must be considered in light of the entire trial record." *Jamison*, 100 F. Supp.2d at 711. This Court will proceed by analyzing each alleged instance of prosecutorial misconduct and then considering them in cumulation.

Franklin's claim that the prosecutor engaged in misconduct during the voir dire phase of his trial is based upon three instances of alleged misconduct. First, Franklin argues that the prosecutor improperly "obtained commitments from jurors to sign a death verdict specifically for Petitioner." (Amended Petition, Doc. No. 25 at 145.) The "commitments" referred [*274] to by Franklin are as follows:

> Prosecutor: And if in this case the facts warrant [the death penalty] and the law allows it, you can join with the other jurors, knowing that it could lead to this man's death?
>
> Prospective Juror: (Nodding head.)
>
> . . . .
>
> Prosecutor: Taking it to the second step, if, during the mitigation phase, you return a guilty verdict, we get to the mitigation phase, sentencing phase, if the aggravating circumstances outweigh the mitigating circumstances can you sign a verdict

> form knowing it could result in the death of George Franklin?
>
> Prospective Juror: Yes.

(Trial Tr. at 368, 626.)

The Court cannot consider these statements by the two prospective jurors "commitments," as Franklin would have it do. Neither question, and neither answer, suggest a predisposition for the death penalty on the part of either prospective juror. Instead, the questions as worded conveyed to the prospective jurors the awesome responsibility service on a jury in a capital case carries with it, and impressed upon them the real possibility that they might find themselves in the position of signing the death warrant of the human being they saw before them. [*275]

Next, Franklin contends the following description of the proper use of evidence that goes to one count in the indictment being used to make findings on another count deprived him of his right to a fundamentally fair trial:

> Prosecutor: In this particular case, as I indicated, we've got one offense occurred July 21st, that's an aggravated burglary, and then there's another aggravated burglary and the murder that occurred late August 7th.
>
> I think during the instructions the judge will tell you they are separate offenses and you consider them separately, but, on the other hand, the law allows you to consider them together. There's a law called same and similar and if you look at one offense, see how it was done and you look at another offense that has similar things to it, you're allowed to consider evidence from the one offense in deciding certain things from the other offense.

> As an example, let's say, I'll pull this out of the air. Let's say you've got three cab drivers held up by a guy wearing a yellow mask and all three times the guy gets away. And next day another guy is held up by a guy wearing a yellow mask and they catch him this time. You can use the fact [*276] this guy was wearing a yellow mask, held up the cab driver and got caught. Maybe you can use that evidence to consider maybe he committed the other robberies with the cab drivers and yellow mask. That's just an example, but I believe the judge in this case will tell you that's the law.

(Trial Tr. at 161-62.) While the Court recognizes the potential for confusion had the jury been left with the prosecutor's prediction of what the court would say when instructing the jury, the fact is that the jury was properly, fully, and clearly instructed on the permissible use of evidence going to one count in the indictment being used as evidence concerning another count of the indictment. (Trial Tr. at 1258-59.) The Court observes, too, that Franklin did not claim the trial court's instruction on the use of evidence in cases where offenses have been joined were erroneous in his Twentieth Ground for Relief, where he attacked other portions of the trial court's guilt-phase instructions.

The last incident of prosecutorial misconduct Franklin claims occurred during voir dire concerns the prosecutor's misstatement of the law regarding the state's burden of proof at the penalty phase of trial. [*277] The prosecutor's statement was that should the jury find the aggravating circumstance outweighed the mitigating factors to "whatever degree, even if it's only slightly," then the jury would be required under law to return a death verdict. Franklin argues that comment improperly changed the standard of proof during the mitigation phase from "beyond a reasonable doubt" to "a preponderance of the evidence." The

requirement that jurors find beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors before recommending the death sentence relates to the degree of confidence the jurors have respecting the relative weight of the aggravating circumstance and mitigating factors, not, as Franklin implicitly contends, the degree to which the aggravating circumstance must outweigh the mitigating factors. Thus, if jurors are convinced beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors to any degree, they may recommend a sentence of death. Leaving aside the question whether the prosecutor's comment violated Ohio law, which is not the concern of this Court in any case, Franklin's argument does not make out a claim that implicates [*278] the federal constitution. *See Tuilaepa v. California*, 512 U.S. 967, 978-80, 114 S. Ct. 2630, 2638-39, 129 L. Ed. 2d 750 (1994).

Franklin also claims the prosecutor engaged in misconduct in the penalty phase of his trial. He argues the prosecutor's use of the details of Franklin's juvenile record revealed far more about Franklin's criminal history than was necessary to impeach Franklin's mother's testimony that he was of peaceful and good character. Julia Franklin had testified on direct examination that her son had been a loving son until about the age of eight, when he became somewhat of a discipline problem. (Trial Tr. at 1320.) She acknowledged that her son had gotten into fights and been caught with a marijuana cigarette in his teen years, and that she had gone to juvenile court with him three or four times, eventually sending him to live with his grandfather for a period of time. *Id.* at 1325-32. She denied Franklin had ever been violent, however, and expressed certainty that he had not murdered Gerald Strauss. *Id.* at 1332. On cross-examination, the prosecutor produced four police reports Julia Franklin had filed against her son in 1983-84 for

running [*279] away, being disobedient, and skipping school. *Id.* at 1333-36. Mrs. Franklin admitted she was unaware that her son had been charged with selling marijuana at school on three separate occasions. *Id.* at 1336. Finally, the prosecutor brought out that an assault charge to which Franklin had pled guilty when he was a juvenile arose from a fight he had had with a girl. *Id.* at 1338.

Confronted with a challenge similar to Franklin's, the District Court for the Northern District of Ohio held as follows:

> The Petitioner has also claimed that the trial court committed constitutional error in permitting the introduction of his prior criminal record during the penalty phase. However, "nothing in the federal Constitution bars the introduction of a defendant's prior criminal record, which is highly relevant to his individual background and character." *Barclay v. Florida*, 463 U.S. 939, 970, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983)(Stevens, J. concurring). In the case sub judice, the prosecutor introduced the Defendant's prior record while impeaching a defense character witness, Carla Elliott, on cross-examination. Elliott testified that the Petitioner was a [*280] "sweet, loving person who never abused her or anyone else." [*State v.*] *Jackson*, [57 Ohio St.3d 29, 41,] 565 N.E.2d [549,] 562 [1991]. The prosecutor then related the extent of the Petitioner's prior violent crimes, particularly against women. Once the door to the Petitioner's character was opened by his trial counsel, the prosecutor was entitled to impeach the mitigation witness using the Petitioner's criminal record. Therefore, the Petitioner's claim concerning

> introduction of his prior criminal record during the penalty phase is without merit.

Jackson v. Anderson, 141 F. Supp.2d 811, 867-68 (N.D. Ohio 2001). In Barclay, the United States Supreme Court explained that a violation of state law does not necessarily result in a deprivation of a defendant's federal constitutional rights:

> The trial judge's consideration of Barclay's criminal record as an aggravating circumstance was improper as a matter of state law: that record did not fall within the definition of any statutory aggravating circumstance, and Florida law prohibits consideration of nonstatutory aggravating circumstances. . . . Nothing in the United States Constitution [*281] prohibited the trial court from considering Barclay's criminal record. The trial judge did not consider any constitutionally protected behavior to be an aggravating circumstance. . . . And, . . . nothing in the Eighth Amendment or in Florida law prohibits the admission of the evidence of Barclay's criminal record. On the contrary, this evidence was properly introduced to prove that the mitigating circumstance of absence of a criminal record did not exist. This statutory aggravating circumstance "plausibly described aspects of the defendant's background that were properly before the [trial judge] and whose accuracy was unchallenged."

Barclay, 463 U.S. at 956 (plurality). The same result obtains in Franklin's case both because the prosecutor's use of Franklin's juvenile record was proper rebuttal to Julia Franklin's testimony on direct examination, and because

introduction of that evidence is not prohibited by the United States Constitution even if it is a violation of state law.

Franklin also points to several statements the prosecutor made in his closing arguments that he claims compromised his right to a fundamentally fair trial. First, he argues that the [*282] prosecutor improperly encouraged the jury to return a death verdict on a standard of proof less than beyond a reasonable doubt when the prosecutor argued to the jury it would have to examine the mitigating evidence, if any, and determine how it "compare[s] to [the] aggravating circumstance." (Trial Tr. at 1370.) It is a leap of Olympian proportions from the prosecutor's words to the conclusion Franklin urges this Court to come to, and one this Court declines to make.

Next, Franklin claims the prosecutor interfered with the jury's ability to give consideration and effect to Franklin's age as mitigation evidence by drawing the jury's attention to Franklin's having lived "out on his own" for a few years. *See id.* at 1371. Again, and even out of context, the prosecutor's comment was not improper, nor did it infect the trial with such unfairness as to make the resulting conviction a denial of due process.

Franklin also argues the prosecutor overstepped the boundaries of proper argument in his comments on the unsworn nature of Franklin's statement. Those comments were as follows:

> And as to his statement on the witness stand, himself, I just remind you of the 25 or 30 people [*283] that came into this court. There was only one that would not swear to tell the truth before they addressed you and that was that man right there, Franklin (indicating). Gave you a very nice, long, eloquent phrase, but remember that before he did it, he would not take an oath to tell the

> truth. I submit . . . he could not take such an oath and tell such a story.

Id. at 1375-76. The trial court overruled a defense objection to the prosecutor's argument after the prosecutor stated he did not intend to go any further with his comments on Franklin's unsworn statement. *Id.* at 1376.

The prosecutor's comments are not substantially distinguishable from those of the prosecutor in *Frazier v. Mitchell*, 188 F. Supp.2d 798 (N.D. Ohio 2001), where the court found no habeas relief was warranted. In that case, the prosecutor argued that the prosecution had presented forty-five witnesses who had taken the oath to tell the truth, but that the petitioner had "testified without taking an oath," thereby avoiding cross-examination, and that the jury should decide the value of the petitioner's statement accordingly. *Id.* at 827. Similarly, in *Mason v. Mitchell*, 95 F. Supp.2d 744, 785 (N.D. Ohio 2000), [*284] the court found no prejudicial error where the prosecutor argued that "the only other evidence that came forth today on guilt or innocence was the Defendant stood up here, or sat here on an unsworn statement, a statement which isn't under oath, a statement which I'm not allowed to cross-examine about, and said, 'I didn't commit this crime.'" *Id.* at 785. This Court acknowledges that the prosecutor in Franklin's case pushed the envelope by suggesting that Franklin could not have taken an oath to tell the truth and made the same assertions as he had in his unsworn statements. It is very unlikely, however, that in light of the entire trial record the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Hill v. Brigano*, 199 F.3d 833, 847 (6th Cir. 1999)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Jamison v. Collins*, 100 F. Supp.2d 647, 711 (S.D. Ohio 2000).

Franklin also claims the prosecutor improperly interjected nonstatutory aggravating circumstances into the jury's deliberations in the penalty phase of trial [*285] by describing Strauss' death struggle with Franklin in the last minutes of Strauss' life, by arguing that the number and nature of the wounds Strauss received were an aggravating circumstance, and arguing that a theft offense for which Franklin was never charged or convicted should be included in the aggravating circumstances side of the scales in the weighing process. The objected-to argument is as follows:

> One thing we know from the testimony that came out in this case, whether [Gerald Strauss] had a chance to see anything, to say anything or not, [Gerald] Strauss was aware of those last few moments. We heard the testimony of a terrible scream.
>
> We also know, I think we can infer from the evidence, at one time he was able to get a hand up to block one of those blows. We heard the testimony of his right hand being fractured. We also heard the testimony of severe injury to his right cheekbone and right here (indicating), shattering the cheekbone, and right here (indicating). And we heard the testimony one final blow to the front of that young man, shattering the orbital bone of the eye, actually disintegrating the eye, itself, squishing it, if you will.
>
> What do [*286] we have at that time? A young man alone in his apartment doing no one any harm, all these injuries having been set upon him. That's one of the circumstances of this particular case.
>
> It goes further than that. At this point in time [Gerald] Strauss is face down. We have a wound

to the back, top, left which shows a tear, a large L tear. I believe you can infer from that Mr. Strauss was still moving or his body was falling away as that wound was inflicted. Thus, you have that tearing-type situation.

At that point we've got [Gerald] Strauss, whose eye is gone, cheekbone's fractured, whose hand is fractured, but he's still not out all the way, unconscious probably, but totally gone? No.

What do we know about the next several wounds to the back of the head? No longer is there a tearing as there was by the ear. No longer is there a tearing by the eye or tearing like this wound. We know the last several wounds were strictly round. No more movement. And I believe you can infer at that point [Gerald] Strauss was still. And we've got a wound up to the top of the head, a wound a little bit further down and a wound to the base of the skull.

Now, we've got a man who's definitely [*287] out, who can't see through one eye, who's got the broken hand, but Franklin still was not satisfied. He needed to go a little bit further. We don't know if it was out of fear that some day [Gerald] Strauss would come to this courtroom and say that's the man that attacked me.

. . . .

Or we don't know, ladies and gentlemen, if he was just that full of hate, that full of a [sic] utter disregard for any life but his own that that's the way he treated that person. But, again, it wasn't enough.

> We heard the final testimony from Dr. Lehman that approximately a four by five inch area of the skull was actually layed open and those pieces of skull driven into the brain by a repeated hammering to the back of that head. That's the nature and circumstances of this particular case, and I submit to you that that is not mitigation.
>
> So, when you weigh all that that [sic] you've been told by the defense, you put all that on the scale, first ask yourself have we been told anything that mitigates or lessens or excuses this particular crime? And even if you find, well, maybe there is something here, maybe there is some mitigation, maybe there is something good about him. Well, [*288] you're not stopped yet because your duty, once you find whatever mitigation exists, is to weigh that against the aggravating circumstances of this case or the aggravating circumstance, that this man needed something, he needed money, he wanted to get money, apparently the testimony is. And how did he go about getting it? Breaking into someone else's house and do what he had to do to get it. And I submit to you in no way does anything you find in mitigation outweigh that.

(Trial Tr. at 1379-83.)

The Court finds nothing improper in the prosecutor's argument. Instead, the argument can reasonably be viewed even in isolation as one making the point that the nature and circumstances of Franklin's offense carry no weight as mitigation evidence, which is fair argument. The prosecutor prefaced the argument above, in fact, with an acknowledgment that the nature and circumstances of the offense are to be considered as mitigation evidence. (Trial Tr. at 1377.) In addition, while it is true that Franklin was not

charged or convicted of a theft offense with regard to Strauss' money or personal belongings, he was convicted of aggravated burglary of Strauss' apartment. The prosecutor's argument [*289] in the last few sentences of the excerpt above were undoubtedly a reference to the Strauss burglary, not some uncharged theft offense.

Next, Franklin claims the prosecutor misstated the law with regard to the process of weighing the aggravating circumstance against the mitigating factors by stating the law required the jury to return a death verdict if the aggravating circumstance outweighed the mitigating factors to any degree. Franklin argues that Ohio law requires the jury to find beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating factors, and that the prosecutor's argument lessened the State's burden to the lower standard of a preponderance of the evidence. Franklin further submits that the prosecutor's reference to "aggravating circumstances" was prejudicial to him, as there was only one aggravating circumstance in his case.

At the time of Franklin's trial, the law in Ohio respecting the weighing of aggravating circumstances and mitigating factors was as follows:

> The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the [*290] burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.
>
> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, .

> . . the trial jury . . . shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender.

Ohio Rev. Code § 2929.03(D)(1)and (2)(Anderson 1987). The flaw in Franklin's argument that the prosecutor's comments lessened the State's burden in the weighing process is that he confuses the degree to which the aggravating circumstance must outweigh the mitigating factors with the strength of the jury's [*291] conviction that the aggravating circumstance does indeed outweigh, to any degree, the mitigating factors. Ohio law required the jury in Franklin's case to be convinced beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating factors, period. Consequently, the prosecutor's statement above was not an erroneous statement of the law. Moreover, no error of a constitutional dimension resulted from the prosecutor's mistaken reference to "aggravating circumstances." Throughout both phases of the trial, the attorneys and trial judge repeatedly referred to a single aggravating circumstance, and at times, when they caught themselves using the plural form, corrected themselves. (*See, e.g.* Trial Tr. at 1383.) No doubt the jury was aware that they had been presented with, and had subsequently convicted Franklin on a single aggravating circumstance. There is no reason to think the jury believed otherwise because of the prosecutor's mistake in his closing argument.

Franklin's next contention is that the prosecutor's statement that "the evidence warrants [the death penalty], the

law allows it and justice demands such a finding" was an improper appeal to the jury. [*292] No authority is offered for the proposition, and the Court notes that it is not only disinclined, but is at a loss to fill in the blanks left by Franklin's skeletal argument.

Next, Franklin claims he is entitled to habeas corpus relief because in his closing argument, the prosecutor reminded the jurors that they had made a commitment to sentence Franklin to death during voir dire. The premise underlying Franklin's argument, to wit, that the prosecutor extracted a commitment from the jurors to sentence Franklin to death, has been rejected above. In addition, the comment to which Franklin objects is this: "The court asked you that if the law allowed and the facts warranted it could you sign a verdict of death penalty and you all said you could do that." One would be hard pressed to demonstrate error of a constitutional magnitude from that subjunctive comment, and indeed Franklin does not attempt to do so beyond unsupported conclusions.

Franklin next argues that the prosecutor mischaracterized the nature of mitigation evidence by describing it as "anything that mitigates or lessens or excuses this particular crime," or "something good" about Franklin. (Trial Tr. at 1382.) Franklin supports [*293] his claim by stating that the Ohio Supreme Court has defined mitigating evidence as evidence that is relevant to the issue of whether an offender deserves the death penalty, and that mitigating evidence is thereby divorced from the offender's legal culpability. But an error of state law is not cognizable in habeas corpus unless the error amounts to a deprivation of a federal constitutional right. Even if this Court assumes

Franklin is correct in his assertion,[14] no violation of any federal constitutional right is implicated.

[*294]

Franklin also contends the prosecutor's encouragement to the jurors that they consider Franklin and his offenses in light of the opportunities he has had, and that the jury compare Franklin to "other people" who have had fewer opportunities and managed to become "good citizens" when determining the appropriate sentence for Franklin. In addition, the prosecutor argued that even after receiving the benefit of a Federal Job Corps training program, funded by "we," presumably meaning the taxpayers, Franklin had committed an aggravated murder. Franklin argues these comments were improper, irrelevant, and inflammatory. The Court concludes, however, that the prosecutor's comments

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[14] The Court notes, however, that many of the mitigating factors set forth in Ohio Rev. Code § 2929.04(B) at least appear to take an offender's culpability into consideration. Inducement or facilitation of the offense by the victim; any duress, coercion, strong provocation, or mental disease or defect that the offender may have been under at the time of the offense; the offender's youth; and the extent to which the offender participated in the offense resulting in the victim's death can all be said to be factors that relate to the offender's culpability. The Court also observes, however, that the Ohio Supreme Court has stated in syllabus law that mitigating factors are "not necessarily related to a defendant's culpability, but, rather, are those factors that are relevant to the issue of whether an offender . . . should be sentenced to death." *State v. Holloway*, 38 Ohio St.3d 239, 527 N.E.2d 831 (1988), paragraph one of the syllabus. Regardless, Franklin makes no cogent argument as to how this issue implicates the federal constitution.

were not wholly beyond the pale of proper argument intended to rebut Franklin's evidence of a deprived childhood and his attempt to become a productive member of society by attending the Federal Job Corp program. While the better practice would be to avoid drawing jurors' attention to the fact that, if they are taxpayers, they funded Franklin's participation in the Job Corp, the prosecutor's comment can also be viewed as a legitimate argument that through the Job Corp, Franklin had an opportunity literally given [*295] to him, and that he squandered that opportunity. When "two plausible interpretations can be given to a prosecutor's ambiguous final argument, the court should not strive to adopt the one which casts doubt upon the prosecutor's intentions." *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982). The error complained of, if error at all, does not rise to the level of a deprivation of a federal constitutional right.

Next, Franklin claims the prosecutor engaged in misconduct when he encouraged the jury to weigh the aggravating circumstance against each mitigating factor individually. Franklin also contends the prosecutor's comment that the mitigating factors did not outweigh the aggravating circumstance was prejudicial. Franklin's first assertion is belied by the transcript. The prosecutor did not encourage the jurors to weigh each mitigating factor individually against the aggravating circumstance, but argued simply that neither the mitigating factors of Franklin's youth or of his criminal history outweighed the aggravating circumstance. (Trial Tr. at 1407.) On the very next page of the transcript, the prosecutor explicitly urged the jurors to add up all the mitigation [*296] evidence and weigh it against the aggravating circumstance. While Franklin contends that statement itself was prejudicial error, the Sixth Circuit Court of Appeals has held that such argument is nothing more than the prosecutors "doing their job." *Buell v. Mitchell*, 274 F.3d 337, 364 (6th Cir. 2001). In addition, the

jury was properly instructed by the trial court that it was to weigh the aggravating circumstance against the mitigating factors to arrive at their penalty determination. (Trial Tr. at 1410.) Furthermore, although Franklin asserts it is so, there is not a shred of support for his claim that the jurors engaged in "piecemeal analysis of comparing only one piece of mitigating evidence against the aggravating circumstance." (Amended Petition, Doc. No. 25 at 151.) The prosecutor's comments did not result in constitutional error.

Franklin also argues that the prosecutor made an improper comment on Franklin's right to remain silent, and inappropriately commented on the veracity of Franklin's unsworn statement by referring to it as "practiced." The prosecutor's argument was as follows:

> You've heard the defendant's practiced unsworn statement, but you [*297] still haven't heard yet one explanation for a print on this bottle. You have not heard an explanation as to why he was broke at 10:30, had money at 2:30 in the morning.

(Trial Tr. at 1408.) It is not clear that the prosecutor's argument targeted Franklin's decision to exercise his right not to testify at his trial, however. The remark can also reasonably be viewed as legitimate comment on what was missing from Franklin's unsworn statement. Likewise, the prosecutor's evaluation of Franklin's unsworn statement as "practiced" is not so different from the prosecutor's comment that a defendant's expression of remorse in his unsworn statement was "shallow" that a different result should obtain here. *See Byrd v. Collins*, 209 F.3d 486, 533-36 (6th Cir. 2000). In *Byrd*, the Sixth Circuit found no constitutional violation. Thus, this Court finds no error of a constitutional dimension in the prosecutor's comments respecting Franklin's unsworn statement.

Finally, Franklin claims the prosecutor's characterization of his mitigation evidence as "pitiful" had the effect of usurping the jury's role as the factfinder in Franklin's case. While the prosecutor's remark may [*298] have been ill advised, the Court cannot say it amounts to a constitutional violation.

Taking all of Franklin's contentions regarding the alleged misconduct of the prosecutor during the mitigation phase together, the Court finds that any arguable merit that materializes from cumulation does not amount to conduct so egregious as to render Franklin's trial fundamentally unfair, under the totality of the circumstances. Accordingly, the Magistrate Judge recommends Franklin's twenty-seventh ground for relief be denied. To the extent that Franklin's ineffective assistance of appellate counsel claim in his first ground for relief relies upon this ground for relief as an underlying claim, that ground for relief, too, should be denied.

Twenty-eighth Ground for Relief

In his twenty-eighth ground for relief, Franklin argues that the trial court's instructions to the jury during the sentencing phase of trial prejudiced him and rendered the jury's death verdict unreliable. Respondent claims the issue has been procedurally defaulted by Franklin's presentation of it in state post-conviction proceedings in the first instance, where it was rejected on res judicata grounds. So far as [*299] that argument goes, it is correct, but Franklin subsequently raised the instant ground for relief as one underlying an ineffective assistance of appellate counsel claim in his Application for Delayed Reconsideration. Because this Court has found the state court did not rely on an adequate and independent state ground under *Maupin* when it dismissed that Application, the Court may address the merits of the present claim to the extent it is necessary in

determining whether the ineffective assistance of appellate counsel claim is meritorious.

Franklin specifies five portions of the instructions that allegedly deprived him of a fair result, and, as in the previous ground for relief, the Court will address each individually, then consider them cumulatively. In doing so, the Court is mindful that "whether a state court's jury instructions satisfy constitutional principles as to the [penalty] decision, a federal court asks 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Jamison v. Collins*, 100 F. Supp.2d 647, 756 (S.D. Ohio 2000)(quoting [*300] *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); and citing *Estelle v. McGuire*, 502 U.S. 62, 72-73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)).

Franklin first argues that the trial court's decision to instruct the jury that they could not be swayed by sympathy in reaching their verdict without a concomitant instruction that the jurors could extend mercy to Franklin, was erroneous to the point of being unconstitutional. The judge instructed the jury as follows:

> It is your duty to carefully weigh the evidence, decide all disputed questions of fact, apply the instructions of the court to your findings and to render your verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your findings, make your finding with intelligence and impartiality, without bias, sympathy or prejudice, so that the State of Ohio and this defendant will feel that this proceeding was fairly and impartially tried.

(Trial Tr. at 1416-17.) A nearly identical instruction was upheld as constitutional by the Sixth Circuit Court of Appeals in *Scott v. Mitchell*, 209 F.3d 854, 877-78 (6th Cir. 2000), [*301] and that court also rejected an argument substantially the same as Franklin's pertaining to a proposed instruction that mercy may be considered by the jury in determining the appropriate sentence in *Mapes v. Coyle*, 171 F.3d 408, 415-16 (6th Cir. 1999). Thus, Franklin's argument is without merit.

Next, Franklin contends the trial court repeatedly referred to the "aggravating circumstances" in his case when there was only one aggravating circumstance. The court recognized its error, however, acknowledged it as error to the jury, and instructed them that there was only one aggravating circumstance in Franklin's case. (Trial Tr. at 1409.) Although the trial court went on to refer to "aggravating circumstances" on two more occasions following the judge's explanation of the error, it is unlikely that the jurors were thereby led to believe there was more than one aggravating circumstance present in Franklin's case, or that Franklin suffered measurable prejudice as a result of the two mistakes, especially in light of the judge's earlier mea culpa and explicit statement that there was only one aggravating circumstance. Thus, the Court finds no error of a constitutional [*302] magnitude.

Franklin's third contention is that the trial court erroneously and prejudicially instructed the jury that the nature and circumstances of the offense were to be considered as an aggravating circumstance rather than a mitigating factor, contrary to Ohio law. In its instructions, the trial court stated, "You will consider all the evidence, arguments, statement of this defendant and all other information which is relevant to the nature and circumstances of the aggravating circumstance, which was that the offense of aggravated murder was committed while the defendant

was committing aggravated burglary." (Trial Tr. at 1412.) Immediately thereafter the trial court instructed the jury that the "nature and circumstances of the offense" were to be considered for any mitigatory effect they may have. *Id.* Although the challenged instruction may not have been in strict conformity with Ohio law, this Court does not view a single instruction in isolation, but rather in the context of the overall charge. Consequently, the Court cannot say the trial court's instruction was such that it created a reasonable likelihood that the jury applied it in a way that prevented the consideration [*303] of constitutionally relevant evidence.

Next, Franklin argues that the trial court's instruction on reasonable doubt was constitutionally defective. The instruction reads as follows:

> Now, reasonable doubt is present [if] after you have carefully considered and compared all the evidence you cannot say you are firmly convinced of the truth of the charge.
>
> Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.
>
> So, proof beyond a reasonable doubt is proof of such a character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.

(Trial Tr. at 1413-14.) Franklin argues that because he had already been found guilty of "the charge" of aggravated murder and one aggravating circumstance in the guilt phase of the trial, the instruction required the jury to impose a death sentence. This Court, however, concludes that reasonable jurors would not understand the instructions above to mean

that they should disregard all the evidence presented [*304] during the mitigation phase of Franklin's trial and return a death verdict based on their earlier finding of his guilt on the aggravated murder charge and its attendant aggravating circumstance. Consequently, the Court finds no error of a constitutional nature in the trial court's mitigation-phase jury instruction on reasonable doubt.

In his last contention under the present ground for relief, Franklin claims the trial court's instruction to the jurors that unanimity was needed before they could recommend a sentence of life imprisonment with parole eligibility after either twenty or thirty years was misleading since if even one juror votes against the death penalty, a life sentence results. This same argument has been rejected by the Sixth Circuit Court of Appeals in *Coe v. Bell*, 161 F.3d 320, 339-40 (6th Cir. 1998), which reasoned that although the information may have been incomplete, it was not misleading, and the Court of Appeals reversed the district court's finding to the contrary. Accordingly, this Court finds no merit in Franklin's argument.

When the Court considers Franklin's arguments pertaining to the jury instructions during the mitigation phase together, [*305] Franklin fares no better than when each was considered individually. Finding no error to cumulate, the Magistrate Judge recommends that Franklin's twenty-eighth ground for relief be denied and that his first ground for relief claiming his appellate counsels' ineffectiveness should also be denied to the extent it relies on the instant ground as an underlying claim.

First Ground for Relief

In his first ground for relief, Franklin contends his appellate counsel were ineffective for a myriad of reasons. As noted above, many of those sub-claims depend upon the vitality of an underlying claim of trial court error, trial

counsel ineffectiveness, or prosecutorial misconduct. The answer to the question whether Franklin's appellate counsel were ineffective for having not raised on direct appeal the errors embodied in the previous twenty-six grounds for relief is answered by the outcome of each underlying claim, above. Thus, the Court concerns itself here only with those ineffective assistance of appellate counsel claims that rely on no underlying claim of trial court error, to wit, Franklin's assertions that his appellate counsel:

> 1 Failed to zealously and skillfully advocate [*306] for him;
>
> 2. Breached their duty to inform and consult with him;
>
> 3. Breached their duty to withdraw from his case upon his request; and
>
> 4. Failed to argue error by the state court of appeals in their appeal to the Ohio Supreme Court.

An account of Franklin's appellate counsel's actions on his behalf will aid in understanding the nature of Franklin's complaints and the Court's resolution of the same. The record reflects that on January 4, 1989, Roxann Dieffenbach was appointed to represent Franklin in his direct appeals to the state court of appeals and the Ohio Supreme Court. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit H, therein.) Sometime later, Candace Greenham was appointed as co-counsel in Franklin's case. In the course of their representation of Franklin from January 4, 1989, to December 5, 1991, neither Dieffenbach nor Greenham ever visited Franklin in prison or spoke with him by telephone. (Evid. Hrg. Tr. at 16, 193.) Instead, all of their communications with their client were in writing, beginning on December 4, 1989, when Dieffenbach first informed

Franklin that she and Greenham had been appointed to represent him on appeal. (Return of Writ, Doc. [*307] No. 15, Exhibit DDD, Exhibit E-1 therein.) In addition, Dieffenbach described six assignments of error she planned to raise in Franklin's appellate brief to the court of appeals, and stated she would be sending him a copy of his brief and the State's brief *Id.* She enclosed a self-addressed envelope, telling Franklin it was "for your use." *Id.*

On December 9, 1989, Franklin responded to Dieffenbach's letter, asking why she had not contacted him earlier concerning his appellate brief. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-2 therein.) Franklin asked to meet with his attorneys soon and complained that he had been "setting here in limbo for a long time not knowing what was going on with my appeal." *Id.* Franklin stated he had "some input on the 'matter' in hand," mentioned that his friend, attorney Richard Arnold, was "looking into some things" for him, and admitted that he did not remember much about his trial. *Id.*

Dieffenbach's next letter to Franklin was dated December 11, 1989. She acknowledged receipt of Franklin's December 9 letter, and apologized that there was "no possible way that either Candy Greenham or I will be able to get up to Lucasville before [*308] Christmas." (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit -3 therein.) Dieffenbach explained that the appellate brief was due on December 22, and that neither she nor Greenham could afford to "take off one or two days from our respective practices right now." *Id.* "In addition," she continued, "this type of travel would more than likely be at our own expense." *Id.* Dieffenbach acknowledged that she and Greenham needed Franklin's "input" in the form of Franklin's reviewing the appellate brief once it was completed, and suggested that they could file a supplemental brief if need be. *Id.* She instructed Franklin to write down

why he felt he had not been adequately represented by his trial counsel, and indicated that any errors asserted in the appellate brief must be apparent on the record. *Id.* Finally, she stated she would call Richard Arnold and discuss with him any matters he had looked into.

In his December 19, 1989, reply, Franklin made his first request for a copy of his trial transcript. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-4 therein.) Franklin said he was willing to review his appellate brief, but that he did not think he would have much comment [*309] to offer without first having a copy of his transcript, and that he doubted he could even contribute much to any supplemental brief without the transcript. *Id.*

Dieffenbach and Greenham filed their brief in Franklin's case in the Court of Appeals for Hamilton County on December 22, 1989. (Return of Writ, Doc. No. 15, Exhibit B.) In it, they raised six assignments of error claiming that (1) Ohio's death penalty statutory scheme was unconstitutional, (2) the trial court's denial of Franklin's motion to sever the Winston offense from the Strauss offenses was prejudicial error, (3) his convictions were against the manifest weight of the evidence, (4) the photographic and videographic evidence admitted at trial was gruesome and prejudicial beyond its probative value, (5) trial court error in the denial of Franklin's motion for a mistrial, and (6) the jury instructions were erroneous. *Id.*

Franklin again wrote Dieffenbach on January 18, 1990, asking for a copy of his appellate brief, and complaining that he had not heard from her in a month. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-5 therein.) In a postscript, he asked Dieffenbach to "write me and tell me something." [*310] *Id.*

Dieffenbach responded on January 26, 1990, and enclosed a copy of the appellate brief with her letter. (Return

of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-6 therein.) Dieffenbach indicated she had been under the impression that Greenham had sent Franklin a copy of his brief, and attributed the delay to "confusion in our communication." *Id.* She solicited Franklin's thoughts on the brief, and stated she would be sending a copy of the brief to Franklin's mother and Richard Arnold. *Id.* Dieffenbach indicated she was making plans to visit Franklin in February. *Id.*

On February 9, 1990, Franklin wrote Dieffenbach, thanking her for the work she and Greenham had done on his brief, and expressing interest in talking with her in person about his case. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-7 therein.) Franklin stated the brief looked good to him, but "what do I know?," and that he would have more to say about his case when Dieffenbach came to visit him. *Id.* Franklin also expressed distrust of one of his trial lawyers, although he did not explain why he distrusted him. *Id.*

Franklin's next letter to Dieffenbach came only days later on February 13, 1990, and [*311] evidences dissatisfaction with his appellate brief. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-8 therein.) In it, he questions the order and substance of the issues raised, and asks Dieffenbach to "please inform me prior to any other legal matter you may persue [*sic*] on my behalf." *Id.*

On March 11, 1990, Franklin wrote Dieffenbach and made a second request for a copy of his trial transcript. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-9 therein.) Although he did not know how much it would cost, he indicated his mother was willing to pay the cost of copying the transcript. *Id.* Franklin also expressed satisfaction with Dieffenbach's representation and seemed to apologize for his previous criticism, stating "Rich," presumably Richard Arnold, "thinks you will do all you can

for me." *Id.* Franklin closed his letter with a postscript that he was looking to hear from Dieffenbach soon. *Id.*

In his next letter, dated April 15, 1990, Franklin questioned whether Dieffenbach was receiving his letters because he was not hearing back from her. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-10 therein.) During a visit, his mother told him Dieffenbach had [*312] told her the transcript had been sent to Franklin, but that it had been returned because there was no George Franklin at the prison. *Id.* The prison authorities told Franklin nothing like a transcript had come for him, however. *Id.* Franklin expressed suspicion that "something is going on without my knowledge," stated he did not like being in limbo, and said he should have received his transcript a long time ago. *Id.* In addition, Franklin said his mother would be coming to see Dieffenbach in person on his behalf because he felt his mother was getting only "bullshit" over the phone and he was "not getting anything out of this letter writing thing!" *Id.* Franklin closed by reiterating that he needed his transcript and that his mother would pay whatever the cost would be to copy it. *Id.*

Dieffenbach responded to Franklin in a letter addressed to Franklin, but sent to the attention of Austin Staut, Esq., and with the salutation "TO WHOM IT MAY CONCERN." (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-11 therein.) The letter appears to be a cover letter composed to accompany the six-volume transcript of Franklin's trial. *Id.*

In an undated letter postmarked sometime [*313] in June of 1990, Franklin indicated he had received and reviewed his transcript. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-12 therein.) He told Dieffenbach that he had found errors that were not but should have been included in his appellate brief. *Id.* After giving examples of some of the errors he spotted, Franklin said it was his understanding that

issues not raised in his appellate brief could not be raised later if they should have been presented before. *Id.* He again asked Dieffenbach to come visit him to discuss his case, inquired as to whether the State had responded to his brief yet, and stated he would like to see the State's answer brief. *Id.* Franklin's letter concluded, verbatim, as follows:

> Now I need to see you or a lawyer that has sometime for me. Now if you can'nt help me just send a letter and tell me I should get somebody els, becaus I'm trying to get off death row not die on it! I'v been here almost 2 yr and haven't seen you yet do you think I trust something like that!? Look I know whats up you all down there are trying to slow walk me. Look send me the pappers that I need for a new lawyer becaus I see now that this is not going to work. [*314] Get back with me and tell me whats up so I can srite Ohio public deffenders office for a new lawyer!

Id.

Dieffenbach responded in a letter dated June 2, 1990, in which she notified Franklin that she had argued his case before the Court of Appeals for Hamilton County several days earlier. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-13 therein.) She also informed him that Greenham had not attended the oral arguments because of a family emergency the night before. *Id.* Dieffenbach noted that Franklin's mother, uncle, and friend Richard Arnold had attended the oral arguments, and solicitied Franklin's comments on the State's answer brief, which she stated she had sent him. *Id.*

On July 13, 1990, Franklin wrote to thank Dieffenbach for her work on his case, acknowledging receipt of the State's answer brief, and to ask that she let him know as soon

as she hears anything concerning his appeal. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-14 therein.)

The state court of appeals affirmed Franklin's conviction on August 15, 1990. *State v. Franklin*, 1990 Ohio App. LEXIS 3385, No. C-890028, 1990 WL 117140 (Ohio App. 1st Dist. Aug. 15, 1990)(unreported). About three [*315] weeks later, Dieffenbach notified Franklin of that outcome. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-15 therein.) Dieffenbach expressed disappointment that "the Court of Appeals did not deal with any of the issues Ms. Greenham and I raised in your appeal," but acknowledged that she "really did not think the court would, but we had hoped." *Id.* She assured him that by the time he received her letter, she and Greenham will have filed a Notice of Appeal with the Ohio Supreme Court. *Id.*

The next correspondence was Franklin's letter to Dieffenbach postmarked October 16, 1990. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-16 therein.) Franklin first questioned whether Dieffenbach was still on his case, and stated that if she was (were?), "me and you need to talk Bad!" *Id.* Franklin demanded to know what was happening in his case, and wrote that he wanted Dieffenbach to withdraw from representing him. *Id.* Franklin stated his intention to write the Ohio Public Defenders Office for new representation, and criticized Dieffenbach's presentation of only six assignments of error in his appellate brief. *Id.*

On December 10, 1990, Dieffenbach and Greenham submitted [*316] their brief to the Ohio Supreme Court. (Return of Writ, Doc. No. 15, Exhibit E.) The brief to the state supreme court was nearly identical to the brief that had been filed in the state court of appeals. *Id.* The cover page had been modified for submission to the state supreme court, and the headings of the same six alleged errors had been

changed from "Assignment of Error" to "Proposition of Law" throughout the brief *Id.*

It was not until December 17, 1990, that Dieffenbach responded to her client. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-17 therein.) The substance of that correspondence, in toto, is as follows:

> On December 10, 1990, I filed the brief in your case in the Supreme Court of Ohio in Columbus. I am sending a copy of the brief and the appendix under separate cover. They are fairly lengthy volumes. Please read them over and let me know if you have any additions.

Id.

Franklin replied on December 26, 1990. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-18 therein.) Franklin asked Dieffenbach if she would be coming to visit him during his appeal to the Ohio Supreme Court, and asked if she was receiving his letters, suggesting that [*317] her actions did not indicate she was receiving them. *Id.* After complaining that she had not visited him, Franklin requested that Dieffenbach write him and tell him how his appeal was proceeding. *Id.*

On January 5, 1991, Franklin wrote to Dieffenbach and provided his input on issues he wanted included in his appellate brief to the Ohio Supreme Court as Dieffenbach had requested. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-19 therein.) He attached a two-paged, single-spaced list of possible errors that occurred at his trial, complete with references to the trial transcript. *Id.* Franklin observed that he knew she would have to "put them in this time or I can 'not' use them later on in my case." *Id.*

Dieffenbach wrote to Franklin on January 28, 1991, informing him that since she had already filed his appellate

brief with the state supreme court, it was not possible to include any of the issues he raised in his January 5 letter in the brief. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-20 therein.) She explained as follows:

> Ms. Greenham and I read over your transcript carefully. We selected those errors which we felt were reversible and prejudicial [*318] error. We discussed the case with Mr. Schmidt and Mr. Rosenwald [Franklin's trial counsel] as well as with Judge Winkler. After this discussion and after reading the transcript we selected the issues we felt would be successful on appeal. While I understand you have concerns, many issues that you have raised in your list have already been decided and relitigating them is a waste of time, energy, and causes the Judges to become very irritated.
>
> After your appeal route to the Supreme Court is exhausted, the State's Public Defender Office will be picking your case up for post conviction relief. They will be able to review the transcripts also and if they feel that these errors that you have submitted to me in your list are viable they can pursue them at that time. We will let you know when this case is set for argument before the Supreme Court.

Id.

In a letter dated January 29, 1991, one which apparently crossed Dieffenbach's letter in the mail, Franklin implored Dieffenbach to let him know what was happening in his case. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-21 therein.) He noted that his mother was coming to visit him every two weeks, and that she had [*319] told him Dieffenbach was doing all she could for him, but he

complained that Dieffenbach was not returning his mother's telephone calls. *Id.* After asking her again what the status of his case was, Franklin acknowledged that he knew "you not coming down here so I not going to ask you that anymore." *Id.*

Six months later, Franklin wrote to Dieffenbach again. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-22 therein.) He began his letter by saying he knew Dieffenbach and Greenham had not appeared in the Ohio Supreme Court on his case as of the date of writing, and stating he wanted to add two issues to his brief by filing a supplement to his appellate brief. *Id.* The errors Franklin perceived related to an erroneous jury instruction, and his trial counsels' ineffectiveness for not having objected to the jury instruction at trial. *Id.* He requested that Dieffenbach file a supplemental brief, or explain to him why there was no error in the jury instruction and his trial counsels' representation. *Id.*

Dieffenbach and Greenham appeared before the Ohio Supreme Court to argue Franklin's case on September 17, 1991. (Transcript of Oral Argument, Return of Writ, Doc. No. [*320] 15, Exhibit DDD, Exhibit D therein.) Dieffenbach began her argument by conceding the futility of the first assignment of error, that relating to the constitutionality of the death penalty statutes in Ohio. The transcript of their arguments include five instances of wholly inappropriate laughing on the part of both of Franklin's lawyers, an admission by Dieffenbach that she may be wrong about one of her contentions, equivocal responses to questions from the justices, and Greenham's introductory statement that she "wished we had more to say on Mr. Franklin's behalf." In addition, Franklin's counsel displayed a lack of familiarity with the facts relevant to the arguments she made to the court. For instance, Greenham did not recall the length of the videotape she argued was gruesome and prejudicial, and stated that "apparently it was very graphic,"

strongly suggesting she had not even viewed the allegedly offending videotape herself. Dieffenbach did not know how many points of identification existed between Franklin's fingerprint and the print lifted from the champagne bottle found in the Strauss apartment. Greenham displayed an astounding lack of solemnity under the circumstances when [*321] she employed the term "overkill" to describe the photographic and videographic evidence, then laughed and said "Excuse the pun."

On September 25, 1991, Dieffenbach notified Franklin in writing that she and Greenham had argued his case before the Ohio Supreme Court. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-23 therein.) Dieffenbach stated that the issues Franklin had raised in his letter were not valid, and that she could not file a frivolous brief. *Id.* She explained why the instruction Franklin had focused on was not erroneous, and that Franklin's trial counsel were not ineffective for not having objected to the instruction. *Id.* Dieffenbach closed by describing the process that would follow the Ohio Supreme Court's resolution of Franklin's appeal, to wit, that his case would be forwarded to the Ohio Public Defenders Office for state post-conviction proceedings. *Id.*

Dieffenbach informed Franklin that the Ohio Supreme Court had affirmed his convictions and sentences in a letter dated November 26, 1991. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-24 therein.) She noted that she had sent copies of the Court's decision to Franklin's mother and Richard Arnold. [*322] *Id.* After elaborating somewhat on the next few steps in Franklin's state proceedings, Dieffenbach wished him luck in obtaining a reversal, and apologized for not being able to do more for him. *Id.* That letter concluded the communications between Franklin and his appellate counsel.

At the evidentiary hearing in these proceedings, Dieffenbach testified that she recognized her former client from a picture she had seen of him, and acknowledged that she had never met or spoken to him during her two-year representation. (Evid. Hrg. Tr. at 16.) She was surprised that it appeared her first contact with Franklin came eleven months after her appointment to his case, and only two and a half weeks before she filed his appellate brief with the state court of appeals. *Id.* at 19-21. Dieffenbach suggested her delay in contacting Franklin may have been attributable to her claimed contact with Richard Arnold and Franklin's mother, or that she could have lost some of her work that would show she had earlier contact with Franklin. *Id.* at 54. Moreover, it was her understanding that ARnold was in frequent contact with Franklin. *Id.* at 56. She further acknowledged that Franklin had no [*323] opportunity to review his appellate brief prior to its having been filed and that she did not provide Franklin with a copy of his trial transcript until one year after she had obtained a copy for herself. *Id.* at 27-30.

In oral arguments before the state court of appeals, Dieffenbach presented argument on the grounds for relief she had written on in Franklin's brief. *Id.* at 35. Greenham was unable to attend the oral arguments due to a family emergency, however, and Dieffenbach explained to the court that she was unable to respond to their questions concerning the other assigned errors after the court had denied her request for a continuance. *Id.* at 33-35. Dieffenbach testified that she communicated with Franklin through Richard Arnold and Franklin's mother about the oral arguments in his case, and stated that she was "fairly sure Franklin was aware of the oral arguments" as both Arnold and Mrs. Franklin were notified of and attended the arguments. *Id.* at 67. Although she did not know the nature of the relationship between Richard Arnold and Franklin, Dieffenbach testified

that he had represented himself to be a good friend of Franklin's, and that she relied on Arnold [*324] and Mrs. Franklin to communicate with Franklin. *Id.* at 76-77.

After the state appellate court rejected Franklin's appeal, Dieffenbach filed a nearly identical brief in the Ohio Supreme Court. Upon Franklin's complaint that she should have included other additional errors, and having apparently been told by the court that it would not permit supplemental briefing, Dieffenbach testified that she had explained to Franklin that any additional errors could be presented to the state court in a petition for post-conviction relief. *Id.* at 37-38. She further testified that she advised Franklin of his right to file a pro se brief in one of her letters to him, but that assertion is disproved by the record. There is no discussion of the availability of a pro se filing in any of Dieffenbach's communications with Franklin.

When asked how she decided which alleged errors to present to the state appellate court, Dieffenbach testified that the trial judge brought a remark he made during the trial to her attention, and suggested that it might have been inappropriate. (Evid. Hrg. Tr. at 43.) That issue appeared in Franklin's brief as fifth assignment of error. In addition, Franklin's [*325] trial counsel suggested that Dieffenbach raise the severance and jury instruction issues. *Id.* at 44. Those issues appeared in Franklin's appellate brief as assignments of error two and six. Franklin's trial counsel also mentioned to Dieffenbach that the photographs were difficult to look at, but Dieffenbach perceived his comment as a warning of the photographs' unpleasantness rather than a suggestion that they be the subject of an assignment of error. *Id.* at 43. Nevertheless, Dieffenbach later testified that Franklin's trial counsel had suggested she investigate the gruesome photograph issue, and she raised that issue as error on appeal as Franklin's fourth assignment of error. *Id.* at 44. Another attorney permitted Dieffenbach and Greenham to

import his arguments regarding the constitutionality of Ohio's death penalty scheme into Franklin's appellate brief, and that issue was presented as his first assignment of error. *Id.* at 45. Dieffenbach and Greenham rejected Franklin's trial counsels' suggestion that they raise on appeal an issue relating to the fingerprint evidence, and instead included a manifest weight challenge, which appeared as the third assignment of error. [*326] *Id.* at 44, 47.

Greenham testifed before this Court as well. She stated she did not recall having had any contact with Franklin in person, in writing, or on the telephone during her representation of him in his appeals. (Evid. Hrg. Tr. at 193.) Rather, she "assumed" Dieffenbach was communicating with their client. *Id.* She had no knowledge of any request filed for a continuance of the oral argument in the state appellate court due to her own inability to attend, or of Franklin's requests that his counsel withdraw from his case, and she testified that she never submitted a bill for her services because her time logs were destroyed in a flood of her office. *Id.* at 191, 196. Greenham testified that it was her recollection that she and Dieffenbach had both read the transcript of Franklin's trial in full, then discussed issues to be raised in the brief and divided them up. *Id.* at 192.

Franklin argues that the representation of his appellate counsel fell below an "objective standard of reasonableness," prejudicing his defense to the extent of rendering his appeal fundamentally unfair and casting doubt on the reliability of the result. *See Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). [*327] In particular, he contends his appellate counsel failed to zealously advocate on his behalf by submitting only six assignments of error to the state appellate and supreme courts for review, by submitting virtually identical briefs to both of those courts, and by their deficient performance at the oral argument before the Ohio Supreme Court. Franklin also

claims his appellate counsel failed to consult with him and keep him informed of the progress of his case.

A petitioner's right to effective assistance of appellate counsel is as follows:

> When a state guarantees criminal defendants the right to appellate review, the right to effective assistance of counsel extends beyond the state court trial to the first appeal as of right in accordance with the Due Process and Equal Protection Clauses of the United States Constitution. *Evitts v. Lucey*, 469 U.S. 387, 392-93, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)(citing *Griffin v. Illinois*, 351 U.S. 12, 18-20, 76 S. Ct. 585, 100 L. Ed. 891 (1956); *Douglas v. California*, 372 U.S. 353, 356-57, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)). [At the time of Franklin's appeals,] the State of Ohio [*328] afforded [capital] criminal defendants appeals of right to the Ohio appellate courts and the Ohio Supreme Court. Failure of the State of Ohio, then, to also provide effective assistance of counsel on direct appeal represents a violation of the United States Constitution. To prevail on a claim of ineffective assistance of appellate counsel, Petitioner must of course satisfy the two-prong test set forth in Strickland, 466 U.S. at 687-88, 104 S. Ct. 2052.

Jamison v. Collins, 100 F. Supp.2d 647, 734 (S.D. Ohio 2000). Appellate counsel are not required to raise every conceivable or non-frivolous issue on appeal, however. *Jones v. Barnes*, 463 U.S. 745, 751 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). On the contrary, "experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."

Id. at 751. Such "winnowing out," however, must be done with the utmost conscientiousness when a person's life is at stake. *Jamison*, 100 F. Supp.2d at 740-41, citing *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). [*329]

In considering Franklin's claim, this Court is guided by the Sixth Circuit's framework for evaluating ineffective assistance of appellate counsel claims as set forth in *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999). There, the Court articulated a non-exclusive list of inquiries to be considered when a petitioner challenges the effectiveness of his appellate counsel; they are as follows:

> 1. Were the omitted issues "significant and obvious"?
>
> 2. Was there arguably contrary authority on the omitted issues?
>
> 3. Were the omitted issues clearly stronger than those presented?
>
> 4. Were the omitted issues objected to at trial?
>
> 5. Were the trial court's rulings subject to deference on appeal?
>
> 6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
>
> 7. What was the appellate counsel's level of experience and expertise?
>
> 8. Did the petitioner and appellate counsel meet and go over possible issues?
>
> 9. Is there evidence that counsel reviewed all the facts?

> 10. Were the omitted issues dealt with in other assignments of error?
>
> 11. Was the decision [*330] to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id. In addition to the non-exhaustive factors set forth in Mapes, a habeas court may look to prevailing norms of practice, such as those articulated in the American Bar Association Standards for Criminal Justice, as a guide to determining the reasonableness of counsels' actions. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984). That guide notes that "assigned counsel has a special responsibility to develop a relationship of trust and confidence with the client so that the client will appreciate that the lawyer knows the case and has the client's best interests clearly in mind." Comment to ABA Standard for Criminal Justice 4-8.3 (2d ed. 1980). Moreover, Standard 4-3.8 and its attendant comment state the following:

> The lawyer has a duty to keep the client informed of the developments in the case and the progress of preparing the defense. A common complaint of laypersons is that lawyers, whether acting in civil or criminal cases, fail to keep their clients adequately informed. Unfortunately, this sometimes occurs [*331] even when the lawyer is preoccupied with performing essential tasks for the client. At best it is difficult for a lawyer to establish and maintain a relationship of confidence and trust with an anxious client in a criminal case, especially one in custody, and this task is made more difficult if the client is not kept reasonably informed. A lawyer must remember that the case is the defendant's case, and the defendant is entitled to know of the progress of the lawyer's work. Here again, the lawyer's duty in this respect is the same whether the lawyer has been retained or assigned. The busy lawyer performing services in many cases at a personal

sacrifice may regard the burden of reporting to the client as an added imposition, but it is important to keep the client aware that the lawyer is actively attending to the client's interests.

Franklin contends his appellate counsel should have raised the following issues on direct appeal:

> 1. Error in the trial court's denial of Franklin's request for an investigator (Third Ground for Relief);
>
> 2. Franklin's death sentence was inappropriate;
>
> 3. Juror Arthur's bias (Sixth Ground for Relief);
>
> 4. The trial judge's comment [*332] respecting a defendant's decision not to testify (Fourteenth Ground for Relief);
>
> 5. Batson claims with regard to prospective jurors Colston and Fowler (Fifth Ground for Relief);
>
> 6. Trial counsel's ineffectiveness (Second Ground for Relief);
>
> 7. Improper jury instructions (Nineteenth, Twentieth, and Twenty-eighth Grounds for relief);
>
> 8. Erroneous admission of victim impact evidence during the guilt phase (Twenty-fourth Ground for Relief);
>
> 9. Prosecutorial misconduct (Twenty-seventh Ground for Relief);
>
> 10. Trial court's response to jury questions and requests during deliberations;
>
> 11. Error in the court of appeals' judgment;
>
> 12. Improper weighing of aggravating circumstance against mitigating factors in the trial

court's sentencing opinion (Fourth Ground for Relief);

13. McClesky claims respecting erroneously dismissed prospective jurors (Twenty-third Ground for Relief); and

14. Error in the proportionality review by the trial court, appellate court, and state supreme court (Sixteenth Ground for Relief).

On balance, this Court finds the majority of the factors articulated in Mapes, and the most weighty of them, support [*333] Franklin's claim that his appellate counsel were ineffective. Franklin's proposed assignment of error relating to Juror Arthur's bias, which forms the basis for Franklin's sixth ground for relief above, was "significant and obvious" from the record, and was clearly stronger than most if not all of the assignments of error presented by his appellate counsel in their brief. There is no authority for the proposal that impaneling a biased juror is ever acceptable. In addition, seating a biased juror has been categorically eliminated from those decisions by counsel that can be considered tactical or strategic. *See Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001), citing *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992).

At the time of Franklin's appeal, Dieffenbach had been practicing law for approximately ten years. (Evid. Hrg. Tr. at 52-53.) She estimated fifty to sixty percent of her practice was in the criminal arena. *Id.* at 52. In a pre-hearing deposition, Dieffenbach noted that Franklin's was her second death penalty case. (Dieffenbach Deposition at 11.) Greenham also testified in these proceedings that she and Dieffenbach had [*334] previously represented one death-sentenced client in the direct appeals process. (Evid. Hrg. Tr. at 205.)

Both of Franklin's attorneys acknowledge that they never met with Franklin to discuss his case. *Id.* at 16, 193. Greenham, in fact, had no contact whatsoever with Franklin during her representation of him. *Id.* at 193.

Although Dieffenbach appeared to solicit Franklin's input respecting his brief to the court of appeals, Franklin was severely handicapped in that endeavor by her failure to provide him with a copy of his trial transcript in a timely manner and her failure to contact him at all until less than three weeks from the date his brief was due to be filed. *Id.* at 18, 30. Moreover, Dieffenbach did not seek Franklin's input on his brief to the Ohio Supreme Court until after it had been filed. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-17 therein; Evid. Hrg. Tr. at 36.) In the end, the conclusion is inescapable that Dieffenbach and Greenham did not discuss with Franklin the issues relevant to his case in any meaningful way.

There was no overlap between the issues actually presented by Dieffenbach and Greenham in their briefs on Franklin's behalf and [*335] the issues listed above that were omitted from the briefs.

Finally, Dieffenbach and Greenham's decision to omit the error respecting Juror Arthur's bias was unreasonable and one only an incompetent attorney would make. While this court has addressed and rejected many of the other errors contended by Franklin to have been improperly left out of his appellate briefs in the state courts, the inappropriateness of Franklin's death sentence, the trial court's response to jury questions and requests during deliberations, and the failure of Franklin's appellate counsel to argue errors in the court of appeals' judgment in their brief to the supreme court are not among them. Thus, the Court will do so at this juncture.

By failing to argue the inappropriateness of the death sentence in Franklin's case before two state appellate courts

which were each under a statutory duty to independently weigh the aggravating circumstance against the mitigating factors to determine just that issue, Franklin's appellate counsel overlooked an argument that, at least in theory, could have resulted in the lesser sentence of life imprisonment rather than death. As has been recently noted, however,

> This [*336] Court could locate no decisions in which the trial court or the intermediate appellate court, after re-weighing the aggravating circumstances and mitigating factors, concluded that the jury erroneously imposed the death penalty. The Ohio Supreme Court has on only two occasions reversed the imposition of the death penalty on the basis that the state had failed to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors.

Lawson v. Warden, 197 F. Supp. 2d 1072 (S.D. Ohio filed Mar. 29, 2002). The Court went on to comment that in Ohio, the jury is the "only realistic possibility" by which a capital defendant can avoid a sentence of death. 197 F. Supp. 2d at 1086. Thus, even if Franklin's counsel had followed the better practice and argued the inappropriateness of the death penalty in his case, it is highly improbable that the state court of appeals or supreme court would have overruled the jury's recommendation and the trial court's adoption of the death sentence. Appellate counsel in a death penalty case is not only responsible for raising issues she believes to be meritorious in the state courts, however. [*337] She must proceed in the case with an eye toward the inevitable federal petition for habeas corpus that will follow. In that regard, her obligation to her client is also to raise claims so that they are preserved for the federal court, where death sentences are sometimes reversed or vacated. *See, e.g., DePew v. Anderson*, 104 F. Supp.2d 879 (S.D. Ohio 2000). Given the

improbability, even in federal court, that Franklin's death sentence would be reversed based on the simple argument that the death penalty in his case was inappropriate, however, the Court cannot say that only incompetent counsel would have failed to raise the claim on direct appeal in the state courts.[15]

[*338]

As for Dieffenbach and Greenham's submission of a brief to the Ohio Supreme Court that was substantively identical to the brief they filed in the appellate court, thereby failing to raise any errors in the appellate court's judgment in the supreme court, such does not constitute ineffective assistance of counsel in and of itself, and instead provides further evidence of counsels' less-than-ideal representation of Franklin. More troubling, perhaps, is Dieffenbach's billing for preparing the brief to the Ohio Supreme Court, in which she charged four and a half hours for changing the cover page, substituting "Proposition of Law" for "Assignment of Error," and making other minor changes to convert the appellate brief into a supreme court brief. (Evid. Hrg. Tr. at

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[15] Franklin's case is distinguishable from *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001). In Cone, the trial attorney presented neither mitigation evidence nor argument for sparing his client's life to the jury, and the Sixth Circuit Court of Appeals found the attorney's representation ineffective on that ground. More importantly, however, is the fact that the United States Supreme Court reversed the Sixth Circuit Court of Appeals' judgment in Cone earlier this year, holding that the Sixth Circuit applied the wrong standard, *Cronic*, in evaluating Cone's ineffective assistance of counsel claim, and finding Cone's claim meritless under the *Strickland* standard. *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

114.) That, however, is not the concern of this Court since at most, it is an ethical question rather than a constitutional one.

Franklin contends another error his appellate counsel should have advanced in the state courts was the trial court's failure to instruct the jurors not to place undue weight on the testimony of a witness simply because the witness' testimony was read back to the jurors during their deliberations and [*339] at their request. There are two inherent dangers in reading testimony to a jury during its deliberations: first, undue emphasis may be placed on such testimony; and second, the limited testimony that is reviewed may be taken out of context by the jury. *United States v. Padin*, 787 F.2d 1071, 1076 (6th Cir. 1986)(citing *United States v. Varsalona*, 710 F.2d 418, 421 (8th Cir. 1983); *United States v. Nolan*, 700 F.2d 479, 486 (9th Cir. 1983); Government of the Canal *Zone v. Scott*, 502 F.2d 566, 570 (5th Cir. 1974)). The second "inherent danger" has no application to Franklin's case because the reread witness testimony included the witness' entire testimony. *See United States v. Rodgers*, 109 F.3d 1138, 1143 (6th Cir. 1997)(finding court eliminated the second "inherent danger" by providing the jury with a transcript of all of the witness' testimony, both direct and cross-examination). Moreover, here, as in *Rodgers*, the jury had not reported an inability to reach a verdict prior to their request that the witness' testimony be read back, a situation that would trigger heightened concern respecting the first [*340] "inherent danger" of overemphasis of the witness' testimony. *Id.* at 1143-44. Furthermore, the witness' testimony, as summarized by Franklin, was that she had heard a "horrible scream" while out walking her dog on the night of the murder, and that her dog's behavior upon returning to her home was similar to that the dog usually displayed when a stranger was passing by her apartment. Her testimony consumed fewer than ten pages of a transcript in excess of 1,400 pages. (Trial Tr. at 908-915.) She provided

no identification testimony, and in fact the most valuable evidence in her testimony was that relating to the scream she heard, which it can be presumed she would have heard regardless of who killed Gerald Strauss. Having reviewed the entire trial transcript, this Court cannot say that reading back the witness' testimony placed undue emphasis on that evidence. *See Rodgers* at 1144; *United States v. Almonte*, 594 F.2d 261, 265 (1st Cir. 1979). Thus, it was not unreasonable for Franklin's appellate counsel to "winnow out" the trial court's failure to instruct the jury regarding the reread testimony, nor was it a step only an incompetent lawyer would [*341] take.

Franklin's appellate counsel's decision to submit a brief to the Ohio Supreme Court that was in all essential respects the same brief they filed in the Ohio Court of Appeals is a practice this Court cannot condone, however. The purpose of an appeal to the state court of appeals is to point out errors that occurred in the course of the appellant's trial. At the state supreme court level, however, the purpose is to contest the appellate court's judgment. In other words, a brief to the Ohio Supreme Court must explain how the appellate court's decision is wrong. It must draw the higher court's attention to errors in the lower court's reasoning or application of the law to the facts of the case. Dieffenbach and Greenham's brief failed utterly in that regard. Instead, they treated Franklin's appeal to the Ohio Supreme Court essentially as a "do over" of the appeal to the state court of appeals.

In addition, Dieffenbach and Greenham's handling of the oral argument before the Ohio Supreme Court was unprofessional and embarrassing. Their capitulations, inappropriate laughter, unfamiliarity with the record, and especially their tasteless joke involving the word "overkill" would be surprising [*342] in any case, but when a person's life is at stake, their conduct takes on special significance. Dieffenbach and Greenham's conduct at the oral argument

revealed a lack of professionalism and denigrated the seriousness of the proceeding.

The Court also observes that Dieffenbach and Greenham's duty during their representation of Franklin was to keep Franklin informed of the progress of his case, not Richard Arnold or Mrs. Franklin. See ABA Standards for Criminal Justice 4-3.8 and accompanying comment. Franklin was their client, not his friend or mother. Nevertheless, their testimony before this Court demonstrates that they communicated more with Richard Arnold and Mrs. Franklin than they did with their client. Such reliance on individuals outside the attorney-client relationship is an inappropriate and insufficient substitute for consultation with the client. While Arnold and Mrs. Franklin were no doubt helpful to Dieffenbach and Greenham, such communications do not take the place of personal interaction with their client. Dieffenbach had some communication with Franklin, but most of that was too late for Franklin to have had any say in the prosecution of his appeal, and none [*343] of it was in person or by phone. Greenham completely abdicated her responsibilities to consult with and inform her client.

Franklin also claims his counsels' ineffectiveness is demonstrated by the order in which they presented the six assignments of error raised to the court of appeals and supreme court. There is no constitutional requirement that issues be raised in strongest-to-weakest order, however, and Franklin cites no authority for such a proposition.

After carefully considering Dieffenbach and Greenham's failure to consult with their client in a meaningful way and their failure to raise the trial court's denial of Franklin's motion for a mistrial based on Juror Arthur's bias as an error on appeal, this Court is convinced that their representation of Franklin was ineffective. A valid claim was not raised on direct appeal as a consequence of

their deficient representation, that being the issue of Juror Arthur's bias. Even after the error was drawn to their attention by their client, Dieffenbach and Greenham dismissed Franklin's complaint that they had not raised the juror bias issue, among others, on appeal and incorrectly advised him that it was an issue that had either already [*344] been litigated, or one that could be raised in his post-conviction relief proceedings. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibits E-12, E-19 and E-20 therein.) Such representation can only be characterized as careless and cannot be tolerated in any case, much less a case involving the most permanent of sentences, death.

Franklin also argues his appellate counsel were ineffective for failing to withdraw from his case upon his request. It is recalled that Franklin twice requested that Dieffenbach withdraw from his case, the second time more explicitly than the first. (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibits E-12 and E-16 therein.) Dieffenbach completely ignored Franklin's requests. At the evidentiary hearing in this Court, Dieffenbach explained that when she received a letter like Franklin's asking that she withdraw, she would take the letter to the administrator of the relevant court and ask if the court wanted her to withdraw. (Evid. Hrg. Tr. at 66.) Dieffenbach testified that in the first of his requests, he only asked her to "send him the papers" he needed to request new counsel, "but if he would file his own, even if he wrote a letter to the Court, they would [*345] take it up." (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-12 therein.) She accurately described Franklin's satisfaction with her representation as "back and forth." (Evid. Hrg. Tr. at 66.) She explained that clients who are not winning their case are frequently dissatisfied with the attorney's performance. *Id.* at 68. Dieffenbach did not interpret Franklin's second request as unequivocal. *Id.* at 69. The relevant portion of that letter is as follows:

> I want to know what's going on with my case. Now if you want to get off of my case I whish you would send my case up to Columbus so I can get some kind of action for myself! look I'm writing the Ohio public defender office to see what I have to do inorder to get me a new attorneys . . . . I want you to withdraw from my case, so I can try an get some one new . . . .

(Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-16 therein.) Dieffenbach testified that she "figured if he wanted to do that, he'd write the state public defender" and that they would contact her. (Evid. Hrg. Tr. at 69.)

Franklin's expert witness, Ira Mickenberg, testified at the evidentiary hearing in this Court that when a client states [*346] he wants his lawyer to withdraw, the lawyer must do one of two things: move to withdraw or contact the assigning agency. (Evid. Hrg. at 96.) The lawyer should also contact the client. *Id.* Dieffenbach did none of those things, and Greenham could not recall whether her client ever asked that his counsel withdraw from his case. (Evid. Hrg. Tr. at 196.)

Franklin's counsels' casual attitude toward their client's request that they withdraw from his case and their failure to acknowledge his request in any way prior to the hearing in this Court is troubling. In and of itself, however, and even if by their conduct they risked sanctions under Ohio Code of Professional Responsibility DR 2-110(B)(4), those circumstances do not present a question of constitutional law. This Court has found no law to support or even suggest support for Franklin's contention that by their failure to withdraw his counsel violated one or more of his rights under the federal constitution, and the cases cited by Franklin that purport to do so miss the mark. *In re Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (N.Y. 1994), for example, is cited for the proposition that a client has an

[*347] absolute right to terminate the attorney-client relationship. (Amended Petition, Doc. No. 25 at 29.) But that case is inapposite to Franklin's case in several important ways: (1) *Cooperman* was a civil case; (2) the issue in *Cooperman* was whether an attorney violated the Code of Professional Responsibility by repeatedly using special nonrefundable retainer fee agreements with his clients; (3) the court's discussion of a client's right to terminate the attorney-client relationship sounded in contract and relied exclusively on state law and state ethical rules; and (4) the court's remarks were dicta. Franklin also cites *People v. Williams*, 2 Cal. 3d 894, 471 P.2d 1008, 1014, 88 Cal. Rptr. 208 (Cal. 1970), as holding that when an attorney is not adequately representing a client, the client is entitled to replace the attorney. (Amended Petition, Doc. No. 25 at 29.) In that case, however, the issue was whether the trial court erred in denying the defendant's motion to substitute new appointed counsel without providing the defendant with an opportunity to state the reasons for his request, not whether his counsel was ineffective for failing to withdraw. Finally, Franklin's [*348] contention that Dieffenbach and Greenham were inspired to remain on his case for pecuniary reasons is amusing[16] but unconvincing.

In summary, this Court finds Franklin's appellate counsel provided ineffective assistance to him during his direct appeal in the state courts by failing to consult with their client, failing to provide him with any real opportunity to participate or have input in his appeal, and failing to raise the issue respecting Juror Arthur's bias on direct appeal. In all other respects, Franklin's claim that his appellate counsel were ineffective is without merit. For the reasons stated, the

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[16] Amusing, because the pecuniary rewards of being appointed to represent capitally charged or convicted individuals are universally known to be minimal.

Magistrate Judge recommends that Franklin's first ground for relief be granted in part and denied in part, and that a conditional writ of habeas corpus be granted.

Second Ground for Relief

In his second ground for relief, Franklin claims his [*349] trial counsel were ineffective for a variety of reasons. Respondent argues Franklin has procedurally defaulted his ineffective assistance of trial counsel claims by not raising them on direct appeal.

Franklin claims his trial counsel were ineffective for the following reasons:

1. They failed to request a fingerprint expert to address the State's fingerprint evidence;

2. They failed to ensure that all proceedings were recorded;

3. Their conduct during voir dire was substandard because:

a. They did not request an instruction that the potential jurors draw no conclusions from the voir dire questions;

b. Trial counsel did not object to incorrect statements of the facts by the prosecutor;

c. They failed to object to comments from by the court and prosecutor that their recommendation of death, should it come to pass, was just that, a recommendation;

d. They did not object to the prosecutor's statement that the jury must recommend death if the aggravating circumstance outweighs the mitigating factors;

e. They did not object when the prosecutor asked potential jurors if they could impose the death sentence "for this defendant";

f. They did [*350] not object to the trial court's excusal of prospective jurors who had any scruples against the death penalty;

g. Their voir dire did not elicit sufficient information from the prospective jurors to enable counsel to intelligently exercise peremptory challenges;

h. They did not develop a theory of the case or adequately ascertain whether the jury could follow the law and consider residual doubt as a mitigating factor;

i. They failed to challenge biased jurors;

j. They did not use all available peremptory challenges;

k. They did not question the prospective jurors about possible racial prejudices they might hold;

l. They raised the prospects of an alibi during voir dire but never presented any evidence of the same;

m. They incorrectly described mitigation evidence as things that are "good" about Franklin, and aggravating circumstances as things that are "bad."

n. They failed to challenge the prosecutor's allegedly neutral explanations for excusing black jurors;

o. They misstated the law applicable to the guilt phase of the trial;

p. They failed to renew the motion for a change of venue;

q. They failed to object to the prosecutor's [*351] misstatements of law concerning "other acts" evidence and the burden of proof applicable to the penalty phase of the trial.

4. They were ineffective at the guilt phase of Franklin's trial because:

a. They failed to object to prejudicial hearsay;

b. They failed to object to prejudicial comments made by the prosecutor during his closing argument;

c. They failed to object to the trial court's jury instruction on the "purpose" element of the aggravated murder charge;

d. They did not object to the trial court's instruction on "foreseeability";

e. They did not request jury instructions on the proper use of "other acts" evidence;

f. They did not adequately explain the State's plea offer to Franklin;

g. They did not object to the prosecutor elicited prejudicial victim impact evidence;

h. They failed to make an opening statement;

i. They failed to investigate or raise the defense of intoxication;

j. They inadequately prepared Franklin's "character witnesses";

k. They did not renew their pre-trial motion for a disclosure of witness statements under Ohio Crim. Rule 16(B)(1)(g);

l. They did not investigate or present evidence [*352] as to the culpability of other suspects.

5. They were ineffective during the penalty phase of Franklin's trial because:

a. They failed to conduct a mitigation investigation prior to the penalty phase of the trial;

b. They failed to object to improper comments by the prosecutor during his closing argument;

c. They misstated the law during their closing argument.

6. They failed to object to erroneous penalty phase jury instructions.

Many of the claims underlying the ineffective assistance of trial counsel claims set forth above have been discussed above and rejected. Consequently, the Court will not address anew claims or sub-claims numbered 2; 3(a), (e), (m), and (n); 4(a) through (e) and (g); 5(b); or 6.

None of Franklin's ineffective assistance of trial counsel claims were raised on direct appeal in the state courts, and they were only presented to the state courts as

underlying claims in connection with Franklin's ineffective assistance of appellate counsel claims. Thus, the success of the underlying claim, that being the ineffectiveness of Franklin's trial counsel, depends upon the success of Franklin's ineffective assistance of appellate counsel [*353] claim. In other words, Franklin must show that his appellate counsel were ineffective for failing to raise trial counsel's ineffectiveness on direct appeal so that the ineffectiveness of his appellate counsel can serve as "cause" for his failure to raise trial counsels' ineffectiveness at the earliest opportunity. Franklin's ineffective assistance of appellate counsel claim under his first ground for relief does not contain all the instances of his trial counsels' alleged ineffectiveness listed above, however. Consequently, any ineffective assistance of trial counsel sub-claim not raised as an underlying claim for his ineffective assistance of appellate counsel claim has been waived in this Court. Sub-claims numbered 3(f), (h), and (n) through (q), and sub-claims 4(i), (k), and (l) are therefore waived. The court considers the remainder of Franklin's sub-claims in the order presented.

In addition, Franklin did not include some of the sub-claims above as underlying claims supporting his ineffective assistance of appellate counsel claims in his Motion to Recall the Mandate and Permit Supplemental Briefing and his Application for Delayed Reconsideration. Any sub-claims not raised in [*354] either of those documents have been procedurally defaulted. Those include sub-claims 4(k) and (l), which consequently are not amenable to habeas review.

Franklin contends his trial counsel were ineffective for failing to request a fingerprint expert who could provide evidence challenging the State's fingerprint evidence. As noted above, Respondent claims Franklin has procedurally defaulted this issue. True or not, Franklin has not demonstrated that he suffered prejudice from his trial counsel's failure to obtain a fingerprint evidence. Franklin's

argument is that there was prejudice to him "because the State's unchallenged expert testimony was the cornerstone of the State's circumstantial case." (Amended Petition, Doc. No. 25 at 71.) There is, however, more than one way to challenge evidence, and cross-examination is one of them. Franklin's trial attorneys ably cross-examined each State witness who testified about the fingerprints found at Rosha Winston's and Gerald Strauss' apartments. Thus, the State's evidence was not unchallenged as suggested by Franklin. Moreover, Franklin has not demonstrated what favorable evidence would have been brought out by his fingerprint expert had he [*355] presented such expert testimony. Without that, there is no showing of prejudice as required by Strickland, and Franklin's claim must fail.

Voir Dire Phase

Next, Franklin contends his trial counsel were ineffective for failing to object to "repeated" incorrect characterizations of the facts by the prosecutor during voir dire. Without enlightening the Court as to which of the prosecutor's statements during voir dire actually constituted the alleged misstatement of the facts, Franklin directs the Court to page 149 of the trial transcript. That page reads in its entirety as follows:

> The defendant is charged in this particular indictment with two separate series of offenses, I guess we could call it. He's charged with an aggravated burglary that occurred on July 21, 1988, Eden Avenue, Clifton, Corryville part of town, an apartment owned by Miss Rosha Winston. The allegations are that on that date the defendant broke in and stole some property, specifically, a television set.
>
> On August 7th, approximately two weeks later, the defendant is charged with going into a

> condominium apartment located on Corry Street, again, in the Clifton, Corryville part of town. The [*356] charge is he broke into that particular apartment, again, committed an aggravated burglary, took some property, specifically a VCR, and while in the apartment he committed an aggravated murder, that is, he purposely caused the death of this Gerald Strauss, Mr. Strauss. Most people called him Bob. Actually, I believe that was his middle name. But that's the basic charges we're dealing with here.
>
> So, just mentioning a little more about . . . .

The Court finds no misstatements of the facts in that passage that would propel all but an incompetent attorney out of her seat to lodge an objection. Thus, Franklin's claim that his trial counsel were ineffective for not doing so is meritless.

Franklin next argues that his trial counsel were ineffective during voir dire because they did not object when the court and prosecutor characterized the jury's death verdict, should it come to pass, as a recommendation. Although Franklin argues the comments were repeatedly made during voir dire, he refers to them as "improper instructions" (Amended Petition, Doc. No. 25 at 73). In addition, Franklin draws to the Court's attention only one instance of such a comment, that being a question by [*357] the prosecutor asking whether one prospective juror could join the others in signing a verdict recommending the death sentence if she knew it could lead to imposition of the death penalty. (Trial Tr. at 209.) This Court is not required to search the record for support of a petitioner's claim that a prosecutor or trial judge "repeatedly" described the jury's death verdict as a recommendation, and declines to do so. *See United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993); *Guarino v. Brookfield Township*, 980 F.2d 399, 404

(6th Cir. 1992); *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989). Moreover, the remark by the prosecutor in voir dire cannot be said to have "watered down" the jury's responsibility in the sentencing phase of Franklin's trial. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990). As a result, there was no deprivation of Franklin's Sixth and Fourteenth Amendment rights as a consequence of the remark, leaving this sub-claim without merit.

Franklin next argues that his trial counsel were ineffective for failing to object to the prosecutor's statement that the jury [*358] must recommend death if it found the aggravating circumstance outweighed the mitigating factors. The substance of this sub-claim is not so different from Franklin's claim in his twenty-seventh ground for relief, where he argued that the prosecutor engaged in misconduct by making the relevant statement, that it warrants a different result. Having found no error in the prosecutor's description of the weighing process under that ground for relief, the Court concludes that Franklin's trial counsel were not derelict for failing to object to essentially the same comment during voir dire. Finally, Franklin provides no authority for his proposition that for every time the jury is informed that they must return a death verdict if the aggravating circumstance outweighs the mitigating factors, it must also be informed that a life verdict was mandatory if the aggravating circumstance did not outweigh the mitigating factors. The Court finds no merit to Franklin's argument.

Next, Franklin contends his trial counsel did not elicit sufficient information from the prospective jurors during voir dire to enable them to intelligently exercise their peremptory challenges. Franklin provides not even [*359] a hint of a suggestion as to what information should have been elicited from the prospective jurors but was not. As such, even if the Court were to find error, Franklin has shown no prejudice flowing therefrom, and this sub-claim must fail.

Franklin also claims his trial counsel were ineffective for not challenging biased jurors. Franklin does not even identify those jurors he characterizes as biased, thus this Court can only presume the allegedly biased jurors are the same ones Franklin claims were biased in his sixth and eighteenth grounds for relief, above. The Court has found merit in Franklin's sixth ground for relief, and in his ineffective assistance of appellate and trial counsel claims as they relate to his sixth ground for relief as well. His eighteenth ground for relief, however, is meritless, as is the instant sub-claim to the extent the latter relies on the former.

Franklin next argues that his trial counsel were ineffective for failing to use all available peremptory challenges during voir dire. This Court is aware of no constitutional requirement that a trial attorney do so, nor does Franklin support his contention with any authority. This sub-claim is unavailing. [*360]

Next, Franklin claims his trial counsel were ineffective because they did not question prospective jurors about any possible racial prejudices they might hold. Even if counsel were constitutionally required to do so, Franklin has made no effort to show prejudice, e.g., to show that any of the prospective jurors actually held racial biases that operated to his detriment. Consequently, this sub-claim must fail.

Similarly, Franklin provides no support for his claim that the jurors were led to expect evidence never presented by his defense counsels' mentioning of a possible alibi defense during voir dire, and counsels' failure to present alibi evidence at trial. Since this Court could find no prejudice even if it were to find error by trial counsel, this sub-claim is without merit.

Guilt Phase

Only three of Franklin's ineffective assistance of trial counsel claims remain after those relying on underlying claims that have already been addressed by this Court and those that have been waived are culled from the list. In the first of those, Franklin argues that his trial counsel were ineffective because they failed to adequately explain the State's plea offer to him. Nowhere, [*361] however, does Franklin explain what information about the offer was kept from him by his trial counsel, nor does he state that but for the trial counsels' failure, he would have accepted the offer. Thus, Franklin has not demonstrated prejudice from his counsels' alleged deficient performance, and this sub-claim must consequently fail.

In the next sub-claim, Franklin contends his trial counsels' failure to make an opening statement at trial constituted ineffective assistance. Franklin makes no attempt to demonstrate how he was prejudiced in his defense by trial counsels' decision, and no constitutional protection is implicated merely by trial counsels' foregoing an opening statement. *Moss v. Hofbauer*, 286 F.3d 851, 863-64 (6th Cir. 2002). Thus, there is no merit to this sub-claim.

In the last of Franklin's ineffective assistance of trial counsel sub-claims relating to the guilt phase of his trial, he argues that his trial counsel inadequately prepared his "character witnesses" and failed to lay a proper foundation for their testimony. Franklin directs the Court to page 1132 of the trial transcript in support of his allegation. On that page is recorded the testimony [*362] of Vera Wise who stated that Franklin had visited her home, and she, his. In addition, she expressed a belief that she knew Franklin quite well, and that he was always nice to her, respectful, and not violent. The cited page in the transcript does not demonstrate to this Court that Franklin's trial counsel inadequately prepared their witnesses, nor does it support his claim that

they failed to lay a proper foundation for the witnesses' testimony.

Penalty Phase

Both of Franklin's remaining sub-claims contending his trial counsel were ineffective at the penalty phase of his trial were raised in his Application for Delayed Reconsideration and are consequently saved for habeas review to the extent they undergird his ineffective assistance of appellate counsel claim. In the first of those two sub-claims, Franklin argues his trial counsel were ineffective because they did not conduct a mitigation investigation prior to the penalty phase of the trial. As an example of trial counsels' ineffectiveness, Franklin argues that mitigation witness Richard Arnold had contacted defense counsel and provided them with an outline of testimony he was willing to give in Franklin's case, but [*363] that defense counsel never contacted Arnold and in fact did not even recognize him when he appeared in the courtroom. Although Franklin gives no dates for the events he describes, the Court observes that the jury returned its verdict in the guilt phase of his trial on Wednesday, December 7, 1988; that Arnold's letter (Return of Writ, Doc. No. 15, Exhibit W, Exhibit F therein) was dated December 8, 1988; and that Arnold testified in the mitigation phase of Franklin's trial on Monday, December 12, 1988. Thus, the Court initially concludes that no error is evident simply on the basis of what Franklin intimates was an unreasonable delay between his trial counsels' learning of Arnold's existence and their presentation of him as a witness at the mitigation phase of the trial.

The Court further notes that most of the evidence Arnold wrote he would give in his testimony in the letter to Franklin's defense counsel was brought out during his testimony. Those items that were not, specifically Arnold's disagreement with the jury's verdict, and his stated intention

to ask the jurors not to compound their error by sentencing Franklin to death, likely would have alienated the jurors rather than [*364] compelled them to exhibit mercy in their sentencing decision. Thus, no deficiency on Franklin's defense counsels' part is evident from the example Franklin provides.

Franklin also contends his trial counsel were ineffective when they failed to interview "most members" of his family and associates, failed to obtain Franklin's social history, and failed to adequately research the law thus precluding presentation of the "bonafide mitigating factor" of residual doubt. As a result of these errors, Franklin claims substantial mitigation evidence was not presented to the jury. Franklin argues a competent attorney would have sought a psychological or mitigation expert in addition to the investigator Franklin's trial counsel requested but was denied.

On careful review of the record, the Court finds that Franklin never raised his trial counsels' failure to request a psychological expert as an underlying claim to his ineffective assistance of counsel claims in his Motion to Recall the Mandate and Permit Supplemental Briefing or in his Application for Delayed Reconsideration. Thus, that portion of Franklin's ineffective assistance of trial counsel claim is procedurally defaulted.

Moreover, [*365] much of the information Franklin claims could have been but was not presented to the jury in mitigation actually was brought out during that phase of the trial. The separation of Franklin's parents when he was young, Franklin's receipt of money from his parents when he was broke, information concerning Franklin's bowel disorder, his move to live with his grandfather for a time during his teen years because of his mother's inability to "control" him, his work history, and his enjoyment of the

elderly people he cared for at his nursing home job were all presented to the jury in the mitigation phase of trial.

There remains some information that was not brought out in mitigation. That, in and of itself, however, does not demonstrate that Franklin's trial counsel were ineffective for not presenting that evidence to the jury. Setting aside whether the remaining information would have been likely to carry weight sufficient to overcome the aggravating circumstance in Franklin's case, this Court notes that the burden here is on Franklin to show that his trial counsel did not present the evidence due to some failure on the attorneys' part to adequately investigate his case and that the omission [*366] was not a tactical or strategic decision on counsels' part.

Franklin was given an opportunity to present evidence of his trial counsels' inadequate investigation or ill-advised decision to omit the information claimed to be mitigating at the evidentiary hearing in this Court. Under examination, however, Franklin's trial counsel[17] was never asked to describe the steps taken to investigate mitigating factors, nor was he asked whether he knew of the information Franklin now claims was left out of his mitigation hearing because of his attorneys' incompetence. In addition, trial counsel was not questioned about whether any tactical or strategic motives had informed his decision not to bring out the information claimed to be mitigatory. Thus, Franklin has shown only that certain information was not provided to the jury during his mitigation hearing, a showing that falls short of demonstrating that his trial counsel failed "make some effort at independent investigation in order to make a reasoned, informed decision" respecting the presentation of

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[17] Franklin presented testimony of only one of his trial counsel at the evidentiary hearing before this Court.

mitigation evidence. *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000).

[*367]

Peter Rosenwald, Franklin's trial counsel, testified in the evidentiary hearing in this Court that had an investigator been approved by the court, the investigator could have interviewed witnesses prior to trial and gathered information beneficial to the defense. (Evid. Hrg. Tr. at 333.) He also stated that he, his co-counsel, and Franklin had come up with a list of fourteen prospective witnesses for the defense, and that although the investigator's primary task would have been to interview the state's witnesses, the investigator also would have been expected to interview other potential witnesses for the defense. *Id.* at 347-48. Tellingly, Rosenwald testified that the investigator would have relieved him of the need to spend his time doing the investigating himself, and he did not suggest the investigation was abbreviated in any way due to the lack of an investigator. *Id.* at 349. That the investigator sought by Franklin's attorneys would have been expected to compile mitigation evidence is not an unreasonable inference from Rosenwald's testimony.

As for Franklin's claim that his trial counsel were ineffective for not arguing residual doubt as a mitigating factor, the Sixth [*368] Circuit Court of Appeals has held that "'residual doubt is not an acceptable mitigating factor under [Ohio Rev. Code §] 2929.04(B), since it is irrelevant to the issue of whether the defendant should be sentenced to death.'" *Buell v. Mitchell*, 274 F.3d 337, 359 (6th Cir. 2001), quoting *Coleman v. Mitchell*, 244 F.3d 533, 544 (6th Cir. 2001). The court reasoned that "it is illogical to find that the defendant is guilty beyond a reasonable doubt, yet then doubt the certainty of the guilty verdict by recommending mercy in case a mistake has occurred." *Id.* Therefore, no constitutional

error results from trial counsels' failure to argue residual doubt as a mitigating factor in Franklin's case.

In his final sub-claim contending his trial counsel were ineffective, Franklin argues his attorneys reversed the burden of proof relating to the mitigation phase of his trial when they stated Franklin had a substantial burden. The comment that occasions Franklin's claim was made by his counsel during their closing argument in the mitigation phase and is as follows: "So I think that we have substantially proved a lack of significant [*369] criminal history on the part of George Franklin." (Trial Tr. at 1390.) While that statement does contain the word "substantially," it does not come close to meaning what Franklin claims it does. Franklin's counsel did not suggest by that comment that Franklin had any particular burden of proof. Instead, he merely noted that in his estimation, the defense had substantially proven a lack of a significant criminal history on Franklin's part. While "substantial" is a word that is frequently employed in discussions respecting one's burden of proof, the word was not being used by Franklin's counsel in that context when he made the statement quoted above. Moreover, Franklin has not demonstrated any prejudice from the remark, even if it is assumed that the jury interpreted it in the same fashion that Franklin would have the Court do now. Consequently, this sub-claim must fail.

Franklin concludes his second ground for relief by arguing that the cumulative error of all of his sub-claims amount to a deprivation of his right to effective assistance of counsel. This Court finds Franklin's ineffective assistance of trial counsel claims, individually and cumulatively, do not demonstrate that he [*370] was denied his right to counsel. For that reason, the Magistrate Judge recommends that Franklin's second ground for relief be denied.

Conclusion

For the reasons stated above, the Magistrate Judge recommends that the writ of habeas corpus be conditionally granted on Franklin's sixth ground for relief, and that the writ also be conditionally granted on his first ground for relief to the extent it relies on the sixth ground for relief as a claim that underlies his ineffective assistance of appellate counsel claim. Further, the Magistrate Judge recommends all other grounds for relief be denied.

Finally, the Court feels compelled to comment on an assertion repeatedly made by Respondent in the "Response to Amended Petition." (Doc. No. 28.) Too many times to count, Respondent asserted that the Ohio Supreme Court had "affirmed" the state court of appeals' denial of Franklin's request for post-conviction relief. Nothing of the sort occurred. The state supreme court merely declined jurisdiction over Franklin's discretionary appeal to that tribunal. The Rules of Practice of the Supreme Court of Ohio provide as follows:

> After the time for filing jurisdictional memoranda has passed, [*371] the Supreme Court will review the jurisdictional memoranda filed and determine whether to allow the appeal and decide the case on the merits. . . .
>
> (B) If the appeal is a discretionary appeal involving a felony, the Supreme Court will do one of the following:
>
> > (1) Deny leave to appeal, refusing jurisdiction to hear the case on the merits;
> >
> > (2) Grant leave to appeal, allowing the appeal, and either order the case or limited issues in the case to be briefed and heard on the merits, or enter judgment summarily.

Ohio S. Ct. Rule III Section 6. In Franklin's post-conviction proceedings, the Ohio Supreme Court denied Franklin leave to appeal. No approval by the state supreme court of the state court of appeals' judgment can be inferred or assumed from the state supreme court's denial of leave for Franklin to appeal. Respondent's repeated assertion that the Ohio Supreme Court "affirmed" the state appellate court is simply wrong.

August 21, 2002.

Michael R. Merz

United States Magistrate Judge

APPENDIX E

GEORGE T. FRANKLIN,

Plaintiff,

v.

CARL S. ANDERSON, Warden,

Defendant.

Case No. C-1-95-1007
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
2002 U.S. Dist. LEXIS 27124
November 1, 2002, Decided

It has come to the Court's attention that the Supplemental Report and Recommendations rendered on November 4, 2002 (Doc. No. 111), included in the Conclusion the erroneous recommendation that Franklin's petition for habeas corpus relief be dismissed with prejudice. Instead, the recommendation should have read that Franklin's petition should be conditionally granted on the grounds and for the same reasons as were articulated in the original Report and Recommendations (Doc. No. 105). This Amended Supplemental Report and [*2] Recommendations corrects that error, but is the same in all other respects to the Supplemental Report and Recommendations (Doc. No. 111).

This matter is before the Court on Respondent's Objections (Doc. No. 106), and Petitioner George Franklin's Objections (Doc. No. 108) to the Magistrate Judge's Report and Recommendations (Doc. No. 105) filed on August 21, 2002. Franklin has filed his reply to Respondent's objections

(Doc. No. 110), and Respondent has filed a reply to Franklin's objections (Doc. No. 109). The General Order of Reference for the Dayton location of the district court permits the Magistrate Judge to reconsider decisions or reports and recommendations when objections are filed.

RESPONDENT'S OBJECTIONS

First Ground for Relief

Respondent objects to the Magistrate Judge's determination that Franklin's appellate counsel were ineffective for their failure to consult with Franklin and to provide him with a meaningful opportunity to participate in his direct appeals in the state courts. In addition, Respondent objects to the Court's finding that Franklin's appellate counsel were ineffective for their failure to raise Juror Arthur's bias as an assignment of error [*3] on appeal. Respondent challenges the Court's procedural and substantive recommendations on those issues.

Procedural Argument

Respondent argues that the Magistrate Judge erred in arguing that Ohio App. R. 26(B) could not be "firmly established and regularly followed" before it existed, and that consequently the Court's determination that Franklin's ineffective assistance of appellate counsel claims have been preserved for federal habeas review is similarly erroneous. The "argument" attributed to the Court by Respondent, however, was actually a summary of a United States Supreme Court discussion on retroactive application of a procedural rule and the ramifications thereof. *See Ford v. Georgia*, 498 U.S. 411, 423-25, 111 S. Ct. 850, 857-58, 112 L. Ed. 2d 935 (1991). Ford established that even though a state procedural rule appeared "in retrospect to form part of a consistent pattern of procedures," a federal court should decline to apply the rule where a defendant could not be

deemed to have been apprised of the rule's existence. Ford, 498 U.S. at 423.

Moreover, Respondent's argument that Franklin's ineffective assistance of appellate counsel [*4] claims were procedurally defaulted fails to take into account the Ohio Supreme Court's recognition in *State v. Murnahan*, 63 Ohio St. 3d 60, 584 N.E.2d 1204 (1992), that the then-existing appellate rules respecting applications for reconsideration or delayed reconsideration and enlargements of time were unrealistic in the context of ineffective assistance of appellate counsel claims, and that court's concurrent direction to the Rules Advisory Committee to consider amendment of the relevant rules. *Murnahan* at 66 fn.6. In addition, Respondent does not contest the Court's observation that case law existing at the time Franklin filed his Application for Delayed Reconsideration confused rather than clarified under what circumstances the Ohio courts of appeals would consider a delayed application on its merits without a showing of good cause for its being filed late (Report and Recommendations, Doc. No. 105 at 48-50). Nor does Respondent challenge this Court's finding in *Landrum v. Anderson*, 185 F. Supp.2d 868, 870-73 (S.D.Ohio 2002), that Ohio App. R. 26(B) is not an independent and adequate state ground in capital cases since the Ohio Supreme Court [*5] could have but has declined to enforce the rule at issue in any capital case since at least the beginning of 2001 (Report and Recommendations, Doc. No. 105 at 51-52).

This trend at the highest Ohio court continues today. In *State v. Bryant-Bey*, 97 Ohio St. 3d 87, 2002 Ohio 5450, 776 N.E.2d 480 (2002), the Ohio Supreme Court affirmed on direct appeal the appellant's convictions and death sentence. In 1999 the United States Supreme Court declined jurisdiction over the case. Bryant-Bey waited until October 17, 2001 to request reopening of his appeal under Ohio App. R. 26(B).*Id.* at 88. After the court of appeals denied his request on the ground that Bryant-Bey had failed to show

good cause for filing outside the ninety-day period allowed by the rule, the Ohio Supreme Court addressed Bryant-Bey's claim of ineffective assistance of appellate counsel on its merits in an October 23, 2002, decision. *Id.* Although Bryant-Bey contested the court of appeals' procedural ruling, the state supreme court found that its own "disposition of Bryant-Bey's appeal on the merits negates any need to decide that issue." *Id.* at 89.

In summary, Respondent has not persuaded the Court [*6] that its resolution of the question whether Franklin's ineffective assistance of appellate counsel claims have been procedurally defaulted should be revisited.

Substantive Argument

Respondent also contends the Court's finding that Franklin's appellate counsel were ineffective on direct appeal is incorrect. In particular, Respondent argues that contrary to the Magistrate Judge's findings, the record demonstrates that Franklin's appellate counsel were in "constant communication" with their client. (Doc. 106 at 15.) While Respondent notes that the record includes no fewer than twenty-six letters exchanged between Franklin and his appellate counsel during their two-year representation of him, only ten of those letters were authored by Franklin's attorneys, the first coming eleven months after their appointment to Franklin's case, and less than three weeks before his appellate brief was due in the First District Court of Appeals. Furthermore, the record reflects that Franklin's appellate counsel were appointed in January, 1989, and that their representation of him continued until late November, 1991, a time period of nearly three years, not the two contended by Respondent. Ten letters [*7] over a two-year and ten-month time is hardly "constant communication."

As for Respondent's observation that Franklin's appellate counsel expressed surprise that eleven months had elapsed between their appointment to his case and their first

contact with their client, and the suggestion that the lead attorney might have lost some paperwork that might have evidenced earlier contact, the Court finds this is pure speculation. The language of the earliest-dated letter from counsel to their client in the habeas record unequivocally adopts an introductory tone, beginning with, "I am writing to inform you that Candace Greenham and I have been appointed by Judge Winkler to represent you on your appeal." (Return of Writ, Doc. No. 15, Exhibit DDD, Exhibit E-1, therein.) Such language is difficult to construe in any way other than as the first letter sent from counsel to their client.

Respondent's description of Franklin's appellate counsels' correspondence to their client accurately notes that their letters solicited Franklin's thoughts about the appeal. What Respondent does not state, however, is that those solicitations were meaningless given their timing, which was after any reasonable opportunity [*8] for Franklin to respond had passed. Franklin's ability to meaningfully participate in his direct appeals was further handicapped by his appellate counsel's failure to provide him with a transcript of his trial for well over one year after Franklin was sentenced, and several months after his appellate brief was due in the court of appeals. Moreover, the twenty-six letters in the record are the sum total of Franklin's appellate counsels' contact with him; there were no phone calls or visits between the attorneys and their client. The suggestion that counsel might keep a third party, in this case Richard Arnold, informed of their client's case as some sort of substitute for actual client contact is completely unsupported in law and unacceptable.[1]

Respondent further argues that Franklin's appellate counsel were diligent in their search for and preparation of

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[1] Without Franklin's waiver of the attorney-client privilege, in fact, his appellate counsels' conduct might arguably have been unethical.

the six assignments [*9] of error presented to the court of appeals and the six propositions of law advanced at the state supreme court. After reviewing the Court's thorough discussion of appellate counsels' performance and representation under the eleven factors articulated in *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999) (Doc. No. 105 at 188-92) as set forth in the original Report and Recommendations, the Magistrate Judge concludes no further analysis is required, and relies on the earlier disposition of that issue.

Finally, Respondent claims that Franklin's appellate counsel were not ineffective for their failure to raise as error on direct appeal the bias of Juror Arthur. That argument relies heavily, as it must, on Respondent's objection to the Court's resolution of Franklin's sixth ground for relief, to wit, that Juror Arthur was in fact biased. Because the Court is unpersuaded that its initial resolution of Franklin's sixth ground for relief was erroneous, no further analysis of the corresponding ineffective assistance of appellate counsel claim is required beyond that set forth in the original Report and Recommendations.

Second Ground for Relief

Respondent objects [*10] of the Magistrate Judge's recommendation that a conditional writ of habeas corpus be granted on Franklin's second ground for relief, wherein he claimed his trial counsel were ineffective for their failure to challenge Juror Arthur as biased. As with Respondent's objection just preceding, the argument here relies on the relative merit of Franklin's sixth ground for relief. As before, and for the same reason, the Court finds no further analysis is required beyond that set forth in the original Report and Recommendations.

Sixth Ground for Relief

Respondent argues the Magistrate Judge's conclusion that Franklin's sixth ground for relief had not been procedurally defaulted was erroneous, and further that the Court's substantive determination that a biased juror sat on Franklin's jury is disputed by the record.

Procedural Argument

Respondent contends the Magistrate Judge's recommendation that Franklin's sixth ground for relief has not been procedurally defaulted is erroneous because "a claim of ineffective assistance of appellate counsel cannot be used to save an underlying claim from being procedurally defaulted." (Doc. No. 106 at 6.) Consequently, Respondent continues, [*11] the ineffectiveness of Franklin's trial and appellate counsel cannot fulfill the "cause" requirement to excuse the otherwise procedurally defaulted claim.

The foundation of Respondent's argument here, to wit that counsels' ineffectiveness cannot resurrect an underlying claim, contradicts long-standing United States Supreme Court law. In *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986), the Court held that "ineffective assistance of counsel ... is cause for procedural default." More recently, the Court has acknowledged that in certain circumstances appellate counsel's ineffectiveness in failing properly to preserve a claim for review in state court will suffice as cause for to excuse a procedural default, so long as the ineffective assistance of appellate counsel claim itself has been preserved. *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591, 146 L. Ed. 2d 518 (2000). Thus, Respondent's argument is unpersuasive, and the Court relies on its earlier determination that the ineffectiveness of Franklin's trial and appellate counsel for their failures to challenge Juror Arthur as biased, and raise her service [*12] on Franklin's jury as error on direct appeal, respectively, serve as cause to excuse the procedural default of Franklin's sixth ground for relief.

Substantive Argument

Although Respondent agrees with the Magistrate Judge's articulation of the law applicable to Franklin's claim that a biased juror served on his jury, he disputes the Court's application of that law to the facts in Franklin's case. Respondent quotes several passages from Juror Arthur's voir dire and her subsequent in camera examination following the jury view to support his claim that there is sufficient evidence of Juror Arthur's ability to impartially judge Franklin to allow a conclusion that she was not biased. Each of those passages, however, were included in the Magistrate Judge's lengthy recitation of all of the portions of the transcript relevant to the issue of Juror Arthur's bias. (Report and Recommendations, Doc. No. 105 at 79-89.) Thus, the segments cited by Respondent were not overlooked or ignored by the Magistrate Judge, and were considered along with the other relevant portions of the transcript in recommending that a conditional writ of habeas corpus issue on Franklin's sixth ground for relief. [*13] As such, the Court relies on its earlier disposition of that ground for relief, and finds no further analysis is required beyond that set forth in the original Report and Recommendations.

PETITIONER FRANKLIN'S OBJECTIONS

Franklin objects to the Magistrate Judge's recommendations concerning his second, third, fifth, eighth, thirteenth, and twentieth grounds for relief. Each will be addressed in turn.

Second Ground for Relief

Franklin claims the Magistrate Judge's conclusion that several of his ineffective assistance of trial counsel claims were procedurally defaulted is erroneous because (1) his ineffective assistance of trial counsel claims presented in the post-conviction proceedings relied on evidence outside the record, and (2) even if the post-conviction trial court relied

on an independent and adequate state procedural ground in rejecting his claims, the state court of appeals revived them by addressing their merits in the post-conviction appeal.

This Court notes that the post-conviction trial court rejected all of Franklin's ineffective assistance of trial counsel claims on one or a combination of the following grounds: (1) it was barred by the doctrine of [*14] res judicata; (2) the evidence submitted with the claim, if any, provided insufficient support; or (3) it was refuted by the existing record. The first of those rationales relies on an adequate and independent state procedural ground. *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082, 121 S. Ct. 786, 148 L. Ed. 2d 682 (2001); *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994); *Van Hook v. Anderson*, 127 F. Supp.2d 899 (S.D. Ohio 2001). Each claim of ineffective assistance of trial counsel rejected on res judicata grounds was, at that point, procedurally defaulted for federal habeas corpus purposes. When Franklin appealed the trial court's denial of his post-conviction petition to the state court of appeals, that court found no error in any of the trial court's determinations that nearly all of Franklin's ineffective assistance of trial counsel claims were barred by the doctrine of res judicata. *State v. Franklin*, 1995 Ohio App. LEXIS 183, 1995 WL 26281 at * 1-3 (Ohio App. 1st Dist. 1995). [*15] Only two of Franklin's sub-claims remained potentially preserved for habeas review because they were the only two sub-claims not denied on res judicata grounds by the trial court and affirmed on that ground by the court of appeals; they will be discussed shortly.

The court went on to consider the merits of Franklin's overarching ineffective assistance of trial counsel claim later in its opinion, concluding that Franklin had not shown that his trial counsels' performance was either ineffective or prejudicial. 1995 Ohio App. LEXIS 183, [WL] at *8-9. Franklin argues that the procedural default of his ineffective

assistance of trial counsel claims was negated by the appellate court's consideration of their merits. The court of appeals' merits analysis, however, was merely an alternative finding after the court had affirmed the trial court's rejection of most of the claims on res judicata grounds, and the Sixth Circuit Court of Appeals has observed that when a state court relies on such alternative grounds, *Harris v. Reed*, 489 U.S. 255, 257, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989) does not preclude a finding that the state procedural rule was actually enforced. *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000). [*16] Therefore, each of the ineffective assistance of trial counsel sub-claims denied by the post-conviction trial court on res judicata grounds, and affirmed by the court of appeals on that same ground, has been procedurally defaulted. [2]

[*17]

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[2] Franklin places particular emphasis on his claim that his trial counsel were ineffective for not obtaining a fingerprint expert to challenge the method used by the police when lifting a fingerprint identified as Franklin's from a champagne bottle found in Gerald Strauss' apartment. Even if that sub-claim were procedurally viable, however, whether to admit that the fingerprint was Franklin's and offer an alternative explanation as to how it came to be on the bottle in the decedent's home, or to instead deny that the fingerprint was Franklin's and attack the government's identification or method of lifting the print would be a strategic decision. Strategic or tactical decisions by counsel are insulated from forming the basis for a finding of ineffective assistance of counsel. Here, counsel apparently chose to offer an alternative explanation, and that many or perhaps most attorneys might choose otherwise does not lead ineluctably to the conclusion that Franklin's trial counsel were ineffective for making the choice they did.

As noted above, two of Franklin's ineffective assistance of trial counsel sub-claims were not dispensed with on res judicata grounds by the post-conviction trial court. Furthermore, neither of those sub-claims were denied on any other state procedural ground and were instead rejected because they were unsupported with sufficient evidence and/or were refuted by the record. Thus, Franklin is correct to the extent that he argues those two sub-claims are preserved for federal habeas corpus review.

In the first of those sub-claims, Franklin contended his trial counsel were ineffective for their failure to investigate potential witnesses who may have been able to cast suspicion for the murder on individuals other than Franklin. Franklin claims he was prejudiced by counsels' failure because counsel did not discover that a neighbor had seen someone who did not match Franklin's description outside Strauss' apartment the night of the murder. Even so, however, that and the evidence submitted to support the contention are not enough to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 686 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984). Thus, this sub-claim, [*18] even if preserved, is meritless.

In the second preserved sub-claim, Franklin contends his trial counsels' ineffectiveness is demonstrated by their failure to conduct or begin their mitigation investigation prior to commencement of the guilt phase of his trial. This issue was addressed and rejected on its merits in the original Report and Recommendations, and no further analysis is required beyond that already conducted. (Doc. No. 105 at 108-210.)

For the reasons stated, Franklin's objections to the Magistrate Judge's Report and Recommendations should be overruled.

Third Ground for Relief

In his third ground for relief, Franklin argued that the trial court erroneously denied him an appointed investigator to assist his trial counsel in preparing for trial. Nothing in Franklin's objection to the Court's resolution of that claim adds to what was before the Court when it made its original determination. Consequently, the Court relies on its previous disposition of the third ground for relief. No further analysis is required beyond that set forth in the original Report and Recommendations.

Fifth Ground for Relief

In his fifth ground for relief, Franklin contended [*19] he was deprived of his constitutional right to a representative jury and equal protection under law because the trial court permitted two African-American prospective jurors to be excused from the jury because of their race. Since Franklin makes no new arguments in support of his claim, the Court finds no further analysis is required beyond that set forth in the original Report and Recommendations.

Eighth and Thirteenth Ground for Relief

Franklin argues that the Magistrate Judge erred by failing to cumulate the prejudicial effect of his eighth and thirteenth grounds for relief. This Court found no prejudice flowed from the claims in either of those two grounds for relief individually when Franklin advanced them in that fashion initially. Having considered the cumulative effect of the alleged errors as Franklin has urged, the Court finds that Franklin has not demonstrated the prejudice necessary to warrant habeas corpus relief. Thus, the Magistrate Judge recommends that Franklin's objections to the earlier resolution of his eighth and thirteenth grounds for relief be denied.

Twentieth Ground for Relief

Franklin objects to the Magistrate Judge's recommendation [*20] that he is not entitled to habeas

corpus relief based on the trial court's instruction to the jury on the scienter element of aggravated murder. No further analysis is required beyond that set forth in the original Report and Recommendations, and the Court relies on its previous disposition of Franklin's twentieth ground for relief.

Conclusion

Based on the foregoing analysis, it is again respectfully recommended that the Petition be conditionally granted on the grounds and for the reasons articulated in the original Report and Recommendations.

November 1, 2002.

Michael R. Merz

United States Magistrate Judge

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail and may be extended further by the Court on timely motion for an extension. [*21] Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may result in waiver of rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

(4)

Filed 11/13/2006

No. 06-513

In The Supreme Court Of The United States

Marc C. Houk,

Petitioner,

v.

George T. Franklin,

Respondent.

On Petition for Writ of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

Response Opposing Petition for Writ of Certiorari

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Argument

It is a well-settled rule in the Sixth Circuit that a constitutional violation based on ineffective counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), is sufficient to establish both cause and prejudice to excuse procedural default of a habeas petitioner's federal claim under *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See, eg., Franklin v. Anderson*, 434 F.3d 412, 418 (6th Cir. 2006); *Lucas v. O'Dea*, 179 F.3d 412, 418-19 (6th Cir. 1999); *Gravley v. Mills*, 87 F.3d 779, 785-86 (6th Cir. 1996).

The Warden petitions this Court to resolve a claimed circuit split over the issue of whether the requirement under *Sykes* to demonstrate prejudice is greater than proof of prejudice under *Strickland*. Respondent's Petition at 9-13. The Warden asserts that Franklin should have been required to demonstrate actual prejudice under the *Sykes* test before the procedural default of his biased juror claim on direct appeal could be excused. Respondent's Petition at 15-19. And the Warden complains that the remedy chosen by the Sixth Circuit — a new trial resulting from the service of a biased juror — would not have been available to Franklin if the Sixth Circuit had required him to demonstrate actual prejudice under *Sykes*. Respondent's Petition at 13-15.

But the result reached by the Sixth Circuit would not vary even if the *Sykes* prejudice test required more than a showing of prejudice under *Strickland*. Franklin demonstrates prejudice under any view of *Sykes* because his trial was made fundamentally unfair by a constitutional error that can never be harmless.

The Warden's "choice of remedy" complaint fails as well. Franklin won a new trial on habeas because his state court pleading that alleged ineffective appellate counsel under Ohio R. App. P. 26(B) [hereafter, 26(B) application] also alleged a separate Sixth Amendment biased

juror claim. The Warden perceives a false interplay between the Sixth Circuit's choice of remedy and his claimed distinction between the *Sykes* and *Strickland* tests for prejudice.

The Warden, moreover, waived all of his procedural default arguments in the Sixth Circuit. At oral argument the Warden's former counsel asked the Sixth Circuit to decide Franklin's habeas appeal on the merits of his biased juror claim. Further, the Warden's "*Sykes* versus *Strickland*" argument was never advanced in either the district court or the Sixth Circuit.

The Warden also fails to demonstrate why the result reached by the Sixth Circuit on the merits of Franklin's claim was incorrect under that court's de novo review. This is not an AEDPA case that would require any special deference to the state court's decision under 28 U.S.C. §2254(d). The result reached by the Sixth Circuit is well-reasoned, fully supported by the record, and necessary to prevent an injustice to Franklin.

1. Franklin wins under any interpretation of the *Sykes* prejudice test.

Even assuming that the *Sykes* test for prejudice requires more than the test for prejudice under *Strickland*, that fine distinction is not important in this case. Franklin's 26(B) application asserted a claim based on the service of a biased juror (Patricia Arthur) during Franklin's capital trial. Franklin won habeas relief (a new trial) on the basis of his biased juror claim, after the default of his claim was excused through the ineffective assistance rendered by his appellate counsel. *Franklin*, 434 F.3d at 422-28. Franklin would be entitled to habeas relief under any view of the *Sykes* prejudice test, however. The record establishes that this "trial was infected with constitutional error." *Franklin*, 434 F.3d at 417 (citing *United States v. Frady*, 456 U.S. 152, 169 (1982)).

"The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." *Id.* at 428 (quoting *Hughes v. United States*, 258 F.3d 453, 463 (6th

Cir. 2001) citing *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000)). The service of a biased juror "cannot be harmless" error. *Id.* (citations omitted). The service of a biased juror on Franklin's jury "infect[ed] the entire trial process, *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993), and necessarily render[ed] [this] trial fundamentally unfair.... [Franklin was denied] basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ...." *See Neder v. United States*, 527 U.S. 1, 8-9 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)) (internal quotation marks omitted). Prejudice under the *Sykes* test is easily established here because the service of a biased juror rendered Franklin's entire trial fundamentally unfair. *See id.*; *Franklin*, 434 F.3d at 428 .

Although Franklin was not required to prove actual prejudice regarding the merits of his biased juror claim, *id.*, the service of a biased juror in this case is sufficient to demonstrate actual prejudice under *Sykes* nonetheless. This Court has made clear that "[t]he cause and prejudice requirement shows due regard for State's finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (quoting *Strickland*, 466 U.S. at 697). *Accord*, *Neder*, 527 U.S. at 8-9 (citing *Rose*, 478 U.S. at 577-78). This Court in *Frady* also emphasized that a showing of actual prejudice to excuse procedural default is made where the habeas petitioner's "entire trial" is infected with "error of constitutional dimensions." 456 U.S. at 170. And in *Murray v. Carrier*, this Court reasoned that "a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial." 447 U.S. 478, 494 (1986). *See also, Franklin*, 434 F.3d at 417 (citing *Frady*, 456 U.S. at 169).

Franklin prevails under any interpretation of the *Sykes* test for prejudice. The "entire conduct of [his] trial from beginning to end . . ." was made fundamentally unfair by the service of a biased juror. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (citations omitted). The constitutional violation in Franklin's case is precisely the type of error that implicates the core concern of habeas review identified by this Court in *Haley*, *Frady*, and *Murray*.

But even if the service of a biased juror would not necessarily satisfy a habeas petitioner's need to show actual prejudice under *Sykes*, the outcome in Franklin's case would still be the same. Franklin can demonstrate case-specific prejudice. As the magistrate judge reasoned in his report recommending relief on Franklin's biased juror claim:

> [T]he Court notes that Juror Arthur executed an affidavit in April, 1993, in which she stated, among other things, that it seemed to her that Franklin's lawyers "should have done more to prove that George was not guilty" and that the defense counsel "should have brought out more evidence to help George." (Return of Writ, Doc. No. 15, Exhibit X at P.7.) Arthur indicated that had the defense done so, she might have voted against Franklin's conviction. *Id.* While it is true that Ms. Arthur also stated she voted for conviction in response to alleged pressure by the other jurors, she leaves no doubt that her fundamental misconception of the burden of proof at trial remained firmly entrenched after the trial judge's repeated attempts to rehabilitate her during voir dire and after the jury view, through Franklin's trial unaffected by the jury instructions, and into 1993 when she executed her affidavit. **Therefore, even if Franklin were required to show prejudice ... from the trial court error and the ineffectiveness of his trial and appellate counsel concerning the seating of a biased juror, he could likely do so.**

Magistrate's Report and Recommendation, reprinted in Appendix to Warden's Petition at 205a (emphasis added).

The Sixth Circuit found that appellate counsel's prejudicially deficient performance satisfied Franklin's burden to establish both cause and prejudice to obtain a merits review of the biased juror claim on habeas. *Franklin*, 434 F.3d at 431. Franklin would, however, satisfy the test for prejudice under any interpretation of *Sykes*. His trial was infected by constitutional error. Simply put, it would be a waste of this Court's resources to grant the Warden's petition. *Cf.*

Freeman v. Lane, 962 F.2d 1252, 1259, n.5 (7th Cir. 1992) ("It is an open question whether this finding of prejudice would also be sufficient to establish 'prejudice' for the purpose of Wainright v. Sykes' cause-and-prejudice analysis....We need not decide this question here, however. Assuming arguendo, that the standards for prejudice under *Strickland v. Washington* and *Wainwright v. Sykes* (as interpreted in *United States v. Frady*...) are distinct, we find that the error committed in Mr. Freeman's trial and appeal satisfied independently either standard.").

2. The remedy does not change under a different interpretation of *Sykes* prejudice.

The Sixth Circuit ruled that Franklin was entitled to a new trial on his biased juror claim; a claim that was presented to the Ohio court of appeals in Franklin's 26(B) application. *See* 434 F.3d at 431. The Warden complains that the Sixth Circuit's finding of prejudice under *Strickland* resulted in a new trial as the remedy on habeas — rather than the remedy of a new appeal — because an additional showing of prejudice under *Sykes* was not required. This complaint is illusory since the Sixth Circuit's choice of remedy did not hinge on the Warden's manufactured "*Strickland* versus *Sykes*" controversy.

In the Sixth Circuit a habeas petitioner may obtain relief by either a new trial or a new appeal when a meritorious constitutional claim is first presented to the state courts by the habeas petitioner's 26(B) application. The choice of remedy in the Sixth Circuit does not depend on whether that court equates a showing of prejudice under *Strickland* to a showing of prejudice under *Sykes*. Rather, the choice of remedy depends on the specific manner in which the habeas petitioner pleaded his 26(B) application in the Ohio court of appeals. A comparison of several Sixth Circuit cases addressing 26(B) motions in capital cases demonstrates that the Warden's "choice of remedy" complaint is hollow.

In *Lott v. Coyle* the habeas petitioner presented various claims alleging constitutional violations in his 26(B) application in the Ohio court of appeals. 261 F.3d 594, 601 (6th Cir. 2001). The Sixth Circuit found that Lott's claims were procedurally defaulted. *Id.* at 607. The Sixth Circuit reasoned that Lott's 26(B) application raised "only the ineffectiveness of his appellate counsel" and "[a]t no point did [Lott's 26 (B) application plead] the discrete [trial error] claim ...." *Id. Accord Mapes v. Tate*, 388 F.3d 187, 194 (6th Cir. 2004) ("The only *holding* of the district court is that 'Mapes did not receive the effective assistance of appellate counsel.... Thus, the only constitutional violation properly before us is the ineffective assistance of *appellate* counsel, the appropriate remedy is the one granted by the district court, that is, a writ conditioned upon Ohio courts granting a new, direct appeal.") (emphasis in original).

A different result was reached by the Sixth Circuit in *Richey v. Mitchell*, 395 F.3d 660 (6th Cir. 2005), *rev'd on other grounds*, *Bradshaw v. Richey*, 546 U.S. 74 (2005). In *Richey*, the Sixth Circuit granted habeas relief on a discrete trial error claim (insufficient evidence to prove Richey's intent to kill the victim). *Id.* at 674-77. What is significant about the *Richey* case for this discussion is that the Sixth Circuit reached the merits of Richey's trial error claim because it was presented to the Ohio court of appeals through his 26(B) application. *Id.* at 679.

As in *Richey*, and unlike in *Lott* and *Mapes*, Franklin's 26(B) application pleaded a claim of ineffective appellate counsel plus a discrete Sixth Amendment claim alleging the service of a biased juror. The first assignment of error in Franklin's 26(B) application alleged a due process violation based on ineffective appellate counsel. *See* Sixth Circuit Joint Appendix, vol. 5 at 4007. In Franklin's second assignment of error he asserted a discrete Sixth Amendment claim based on the service of a biased juror: "Mr. Franklin's convictions and sentences must be reversed because the service of a biased juror violated his right to trial by a fair and impartial jury and to

due process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution." *See* Sixth Circuit Joint Appendix, vol. 5, at 4020. Contrary to the Warden's assertion, the "*Sykes* versus *Strickland*" prejudice question did not determine the Sixth Circuit's choice of remedy in *Franklin v. Anderson*.

And the Warden concedes that a new trial may be the proper remedy in some cases where ineffective appellate counsel is "used as a gateway to some underlying substantive claim...." Respondent's Petition at 14. This is such a case. Franklin won a new trial on habeas because he pleaded both a due process claim alleging ineffective appellate counsel and a meritorious Sixth Amendment claim in his 26(B) application.

3. The Warden's default arguments are waived.

This Court should not accept the Warden's "*Sykes* versus *Strickland*" question for review because the Warden's counsel asked the Sixth Circuit to reach the merits of Franklin's biased juror claim during oral argument. *See* Affidavit of Respondent's Counsel, Appendix at A-1. The position taken by the Warden in his petition for certiorari is thus "irreconcilable with [the position taken by the Warden's counsel at oral argument]" and so the Warden should "not be heard to dispute it here." *See Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988).

The Warden's "*Sykes* versus *Strickland*" argument, moreover, should be deemed waived because it was not raised in either the Sixth Circuit or the district court. During these habeas proceedings the Warden argued on other grounds that Franklin's biased juror claim was defaulted. Now the Warden argues for the first time in his petition to this Court that Franklin should have carried a greater burden to demonstrate prejudice under *Sykes*. *See Franklin*, 434 F.3d at 417-21 (discussing procedural default question, but not discussing "*Sykes* versus *Strickland*" prejudice question); *Id.* at 431-32 (Batchelder, J., dissenting) (arguing biased juror

claim was defaulted; but dissent did not address issues of whether Franklin failed to make a sufficient showing of prejudice under *Sykes* test). *See also,* Amended Supplemental Report and Recommendations, reprinted in Appendix to Warden's Petition at 342a-355a ("*Sykes* versus *Strickland*" question was not raised in Warden's objections to magistrate judge). This issue is waived because it was not presented below.

4. Franklin is entitled to the writ of habeas corpus on his biased juror claim.

The Warden's petition should be denied because Franklin's trial was rendered fundamentally unfair by the service of Patricia Arthur. The voir dire transcript establishes that Arthur steadfastly maintained her belief, contrary to law, that Franklin had to testify or otherwise produce evidence of his innocence before Arthur could ever acquit him.

In voir dire the prosecuting attorney asked "[n]obody wants George to say anything?" Arthur replied: "To prove he's innocent." Sixth Circuit Joint Appendix, vol. 2, at 1021. The trial judge then attempted to correct Arthur's misunderstanding of the law. *Id.* at 1022. But when later questioned by defense counsel, Arthur made this telling comment: "I believe that he should bring himself out, if he didn't do it, just testify, tell what happened, you know." *Id.* at 1097. Arthur then explained her belief that Franklin had a burden to prove his innocence: "[E]ven if the evidence is not against him, that they have brought evidence to find that he's not guilty." *Id.* at 1099.

Again and again, Arthur made similar statements that raised serious, unresolved doubts about whether she could set aside her beliefs and follow the law. Four times the trial judge tried to set Arthur straight by explaining that her beliefs were contrary to the law. *Id.* at 1022, 1097, 1098, 1099-1100. The judge's repeated attempts to rehabilitate Arthur failed, however. *Franklin*, 434 F.3d at 427-28.

After the judge's final attempt to set Arthur straight at voir dire, her bias resurfaced within the context of a completely different line of questioning. When defense counsel sought Arthur's views on the death penalty, Arthur revealed her inability to be rehabilitated with this telling statement: "Well, what I consider to be the right thing is if justice is done, either way. If he's proven guilty, then justice is done. **If he's proven not guilty then justice is done.**" Sixth Circuit Joint Appendix, vol. 2, at 1107-08 (emphasis added). Those were Arthur's last words on the subject, and no attempt was made by the trial judge to rehabilitate her after that statement was made.

Accordingly, the Sixth Circuit was correct to find that a biased juror was empanelled in Franklin's capital trial. *See* 434 F.3d at 427-28 (citations omitted) ("Even after [Arthur] was corrected three times by the judge, she still insisted with her last statement that the defendant had to be proven innocent.... While we appreciate the judge's attempts to rehabilitate this juror, he had a duty to dismiss a prospective juror who could not follow the law.... As such, the trial court's failure to dismiss [Arthur] constituted manifest error and does not merit the presumption of correctness normally due trial court fact findings...."). The Sixth Circuit also correctly determined that Arthur's service on Franklin's jury created a structural defect that requires a new trial. *See id.* at 428. And Franklin filed his habeas petition before the effective date of the AEDPA. *Id.* at 417. As this is a pre-AEDPA case, no special deference was owed to the result reached in the state court. *Early v. Packer*, 537 U.S. 3, 8 (2002).

5. Appellate counsel were ineffective during Franklin's appeal of right.

The job done by appellate counsel (Dieffenbach and Greenham) on Franklin's appeal of right was exceedingly poor and harmful to Franklin's right to due process on his appeal of right. *See, generally, Evitts v. Lucey*, 469 U.S. 387 (1985). Appellate counsel's neglect of duty, and

their embarrassing display of frivolity at oral argument before the Ohio Supreme Court, are well-documented in the Sixth Circuit's opinion. *Franklin*, 434 F.3d at 429-31. Appellate counsel neglected their duty to consult with Franklin, to keep him informed, to heed his request to withdraw from the appeal, and to advise him of his right to file a pro se brief to raise issues that Franklin himself identified — including the biased juror claim that was successful on habeas. (The Report and Recommendation issued by the magistrate judge sets out in painstaking detail appellate counsel's horrendous performance. *See* Report and Recommendation, reprinted in Appendix to Respondent's Petition at 296a to 325a.) Simply put, "[n]o client in his right mind would have paid one cent for such a performance." *High v. Rhay*, 519 F.2d 109, 113 (9th Cir. 1975).

Most important, however, was appellate counsel's failure to raise the winning biased juror claim on Franklin's appeal of right. This was an obvious issue, preserved for appellate review by trial counsel's mistrial motion, and this claim was even brought to appellate counsel's attention by Franklin. *Franklin*, 434 F.3d at 429-30. In view of this unjustified omission, the Sixth Circuit properly found that appellate counsel's ineffectiveness established both cause and prejudice under *Sykes* to excuse Franklin's failure to raise the biased juror claim on direct appeal. *See id.* at 431.

And the Warden's claim that Franklin manipulated the criminal justice system by filing his 26 (B) application is specious. *See* Respondent's Petition at 15-19. Franklin's trial counsel moved to strike juror Arthur from the panel after a view of the crime scene. Sixth Circuit Joint Appendix, Vol. 2 at 706. Then on appeal, Franklin identified the winning biased juror claim in a letter to his counsel. *Franklin*, 434 F.3d at 429-30. But appellate counsel did nothing to redress this constitutional error. *See id.* Accordingly, Franklin had no recourse but to raise this Sixth

Amendment violation by his 26(B) application. It was hardly a matter of manipulation or gamesmanship by Franklin for him to expect a fair trial — and competent representation on his appeal of right — and then to seek available state remedies when those rights were denied him.

Conclusion

There are no "compelling reasons" to grant the Warden's petition. *See* Supreme Court Rule 10. Franklin would demonstrate prejudice under any interpretation of the *Sykes* test to excuse procedural default. Franklin's entire trial was rendered fundamentally unfair by a constitutional error that can never be harmless. Further, the reasons for review advanced in the Warden's petition were not presented to either the district court or the Sixth Circuit — and the Warden's counsel at oral argument asked that court to reach the merits of Franklin's biased juror claim.

The Warden's petition for certiorari should be denied.

Respectfully submitted,

David H. Bodiker
Ohio Public Defender

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Chief Counsel
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No. 06-513

In The Supreme Court Of The United States

Marc C. Houk,

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On Petition for Writ of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

Appendix to Response Opposing Petition for Writ of Certiorari

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No. 06-513

In The Supreme Court Of The United States

Marc C. Houk,

Petitioner,

v.

George T. Franklin,

Respondent.

Affidavit Of Respondent's Counsel In Support
Of Response Opposing Petition For Certiorari

County of Franklin,

State of Ohio, ss:

1) I, Joseph E. Wilhelm, affirm that the following is true:

2) I was appointed by the Sixth Circuit under the CJA to represent Respondent George Franklin. I argued Mr. Franklin's habeas appeal in the Sixth Circuit on March 17, 2005.

3) Assistant Attorney General Heather Gosselin argued this habeas appeal on behalf of the Warden in the Sixth Circuit.

4) At oral argument I spent a considerable amount of time asserting that Mr. Franklin's 26(B) Application (alleging ineffective appellate counsel) was not procedurally defaulted.

5) On rebuttal, Chief Judge Boggs asked Ms. Gosselin what her response was to my arguments regarding the procedural default issue.

6) In reply to Chief Judge Boggs's question, Ms. Gosselin asked the Sixth Circuit to decide the habeas appeal on the merits of Mr. Franklin's biased juror claim. The biased juror claim was raised in state court in Mr. Franklin's 26(B) application.

7) I considered Ms. Gosselin's answer to be a major concession by the Warden on an important procedural issue in the habeas appeal. Accordingly, her answer stayed in my mind after the argument because of the significance I placed on it.

8) After I was served with the Warden's petition, I immediately realized that the Warden's new counsel was arguing procedural default in a manner that seemed to me to be wholly inconsistent with Ms. Gosselin's answer to Chief Judge Boggs's question.

9) I therefore purchased a cassette tape of the oral argument in this case from the Clerk of the Sixth Circuit on October 12, 2006. (A receipt for the purchase of this cassette tape is appended to my response opposing the Warden's petition.)

10) I had the oral argument cassette tape transcribed so I could append it to Mr. Franklin's Response Opposing Certiorari in this Court. My purpose for obtaining the argument transcript was to demonstrate to this Court that the Warden's position on certiorari is inconsistent with his counsel's position at oral argument in the Sixth Circuit.

11) Unfortunately, the oral argument cassette tape that I received from the clerk stops before Ms. Gosselin answered Chief Judge Boggs's question during the Warden's rebuttal argument.

12) The transcript of the cassette tape produced only seventeen pages of transcript from an hour long argument.

13) I am appending this affidavit in lieu of Ms. Gosselin's answer to Chief Judge Boggs's question on procedural default during the Warden's rebuttal argument in the Sixth Circuit.

14) A copy of the partial oral argument transcript from Mr. Franklin's habeas appeal is appended to my response in opposition to the Warden's petition.

JOSEPH E. WILHELM

Sworn to and subscribed before me this 13th day of November 2006.

NOTARY PUBLIC

BRENDA L. JONES
Notary Public, State of Ohio
My Commission Expires 9-24-2010

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(Bailiff) Arnold S. Anderson, Warden vs. Warren G. Franklin. (Inaudible) is presided. Judge Joslin with the appellate cross appellee.

{Judge} You may proceed.

{Counsel} Thank you Your Honor. Good afternoon. May it please the court and Counsel, my name is Heather Doslin. And I will be arguing today on the behalf of the Warden, State of Ohio. With the courts permission I would like to reserve ten minutes of your time.

{Judge} You may.

{Counsel} Thank you Your Honor. Mr. Franklin was convicted for the 1988 murder of Gerald Straus and sentenced to death in Hamilton County in 1989. Fourteen years later, the District Attorney stated that of all the convictions sentenced based on two issues for instance (Inaudible) petition. First acclaimed that one juror, uh that - - that juror being Patricia Arthur was a bias juror and second acclaimed that his Direct Appeal Appellate Counsel were ineffective. And when respectfully submitted to the District Court error and (Inaudible) petition of leave on each of these issues and asked this honor - - Honorable Court to reverse the District...

{Judge} I take it those two issues are not independent in the sense that either one of them standing alone, would not uh - - would not bring relief, is that your view?

{Counsel} You believe that either one alone did I believe (Inaudible)?

{Judge} For the to - - to for the - - for the opposition that is to say if - - if the counsel was generically ineffective in the Strickland effectiveness sense but there was no valid issue to prevail on there wouldn't be relief. And again, conversely if the Juror potentially, at least was bias but if counsel had been effective at every stage then their procedural default might apply...that's simply the way I was looking at it.

{Counsel} And that is correct.

{Judge} I mean we'll see whether your adversary agrees but that was my initial analysis.

{Counsel} That is correct. Um, and I would like to begin uh with the issue of the bias juror claim. And I know you just uh mentioned procedural default the District Courts did find common prejudice for the procedural default and then went to direct (Inaudible). And I believe that the most troubling issue is the fact that the court granted on (Inaudible) merit and that's what I would like to spend um at least a - - a part of my argument here today, arguing before you. This issue is one of credibility and the trial court was in the best position to assess juror verse credibility. The trial courts

believe that Ms. Arthur could be fair and impartial is entitled to a conjunction of correctness that can only be up over compact hearing remaining evidence. And the District Court looked at three different area. They looked at statements that she made out of Voir Dire, statements that she made during a jury review and after they had typically provided in post conviction, which had it the claim had been based on direct appeal would not have been um obviously part of that record. With that, we now properly be before that court. Um, the issue first began in general Voir Dire. Defense counsel stood up in general Voir Dire and asked a question like we do, probably in many if not all cases, um criminal cases that being whether anyone believes that the Defendant should get on that stand and testify and tell his side of the story. At that point, three jurors raised their hand and indicated that they believe the defendant should take the stand to prove his innocence. Juror Arthur being one of those. Um, at that point the Judge stepped in and explained to uh the veneer panel what the law was in fact that the State held no burden of proof and the Defendant did not need to take the stand. Um, I think he had. They asked - - the court then asked if the jurors could accept that and the record doesn't indicate that those three jurors said anything and the Judge just says okay and they move on. Now we've fast-forwarded time. General Voir Dire in the morning, in the afternoon they come back

for individual Voir Dire on the death penalty qualification component. And first the Prosecutor stands up to start um inquiring and the - - in regards to Juror Arthur, she was asked um the statement that would say, if whether or not she understood that the state had the burden of proof on each and every element and would hold the state to that burden of proof. She indicated that she would. He then moved on to issues of the death penalty and he said, "If the State finds this Defendant guilty beyond a reasonable doubt, could you find him guilty knowing that the death penalty could be a possible penalty?" She repeatedly couched her answers with "if he's proven guilty", she wouldn't just say yes, she said, "If he's proven guilty". The Defense or I'm sorry, the State sits down, the defense gets up with individual Voir Dire. He goes back to her statement in general (Inaudible) that morning about whether or not um; he believed that she, that the defendant was required to prove his innocence. Ms. Arthur stated that she believed that it was her opinion, that he should tell what happened At that point the Judge again instructed and this is what's interesting in that it was individual Voir Dire when the rest of the veneer was actually in the courtroom. So, he kind of gave us the same general instruction again to Ms. Arthur, to us, to the rest of the veneer as well. Um, he explained the law. And he asked if she understood the law. She said that she did. And then, he said um, he asked if she would hold

it against - - if she would hold it against the defendant if he doesn't produce anything. And, if she would not do that and she responded, "I guess so, if that's the law". Now, at that point and time I turned it back over to the defense counsel, defense counsel was not comfortable with that answer of, "I guess so". So he went on to further inquire, um let me just read a little bit, a portion of that transcript and I'm reading from appendix pages 1100 and 1101. "Question: If we were to try a case in the State turned on evidence and George didn't take the stand would you hold that against him? Answer: No. I wouldn't hold it against him. Question: Would you think that would have something to do with his guilt? Answer: No. Question: You wouldn't think you, wouldn't consider that at all? Answer: No, I wouldn't. At that point and time defense counsel moved on with individual questioning um, on the issue of death penalty qualification ultimately um both sides passed Ms. Coughlin, she sat on the jury. Now the fact that Ms. Arthur initially held an opinion, said the Defendant should testify or should want to tell the jury what happened and responded with an "I guess - - I guess so " is not clear and convincing evidence (Inaudible).

{Judge} You mention that again I was gonna ask you about it anyway so that's uh a good lead in.

{Counsel} Okay.

be the right thing. Well...I consider the right thing as a justice is done either way if he's proven guilty, the justice is done. If he's proven not guilty then justice is done. And, Magistrate Judge Mers says well that's - - that's the final wrap up and it still looks like she thinks one side or the other has to prove there's no middle - - middle way. What do you make of that?

{Counsel} I make of that as being an issue of semantics with a lay person. What I take from that of first day proven guilty or proven not guilty is she doesn't have a proven condition that client is guilty whether she comes to the court with an open mind and she...

{Judge} Well if she comes with an open mind um I'm - - I'm willing - - I'm willing to give her that she - - that she comes to court with an open mind as between the two sides. But the problem we face is there's certainly a fair amount of indication that she - - she's really not a - a with the program on - -on who wins if uh - - if neither side proves their case. That is, she seems to say one side or the other has to prove it and that's rather contrary to the - - to the presumption of innocence and the burden on the prosecution. So that - - that's what we're trying to deal with. Isn't it?

{Counsel} That's true, um but I mean you need to look at everything in the complete context of all - - of all her answers. Um jurors are constantly saying either you know they're - - they're uh mistaking the laws as far as you know who proves what. I just had a capital

child at the end of last year and jurors were constantly getting confused with the burden of proof in the litigation phase of the trial. Did the State have the burden of proof but the Defense had the burden of going forward and if Defense doesn't present anything then what happens. And jurors were constantly, you know, expressing concerns well you have to prove to me that the death penalty is not warranted but when questioned them further they - - they grasp that concept. The concept of the State having the burden of proof it was just you know, merely semantics and them thinking well, if the State proves the aggravating circumstances and the Defendant doesn't prove anything you know, they prove anything - - then clearly - - then clearly they outweigh. And I think if you look at the entire um uh appendix you know, all together that becomes clearer and those - - those (Inaudible) just doesn't happen uh Your Honor to be appendix volume II, pages 1020-1023, 1085...(inaudible)

{Judge} I'm sorry these are pages of what, the Voir Dire?

{Counsel} I'm sorry. The Voir - -

{Judge} (Inaudible) I'm - - I'm familiar with that.

{Counsel} Okay. If (Inaudible) if you - -if you are done with that. Um, the other thing is that I would say on that is moving to the issue of what happens at the jury veto. She's ultimately seated on the jury obviously and they have a jury veto and when she's shown the

Gerald Strauss apartment she said, "Either was that the window he got in or where did he break in", and they come back, they bring her in to chambers. They question her on the record with what she means by that. They again ask her if she'll keep an open mind in this case and wait until she hears all the evidence. She again says um that she will, um and keeping this in mind it's important to remember the logistics of a jury view. I think jury views can be very useful but I think they can also be very confusing. Jurors attend the jury view before they know anything about the case at this point and time all she knew is that he'd been charged with aggravated murder and two aggravated burglaries. Um...

{Judge} Let me ask you one thing about the jury view. The Judge did not accompany the jury out there to the jury views, is that right?

{Counsel} I believe so, that's correct.

{Judge} Is there any uh problem uh in the case law regarding whether uh the jury should view the scene um without the supervision of the court or - - or without supervision of the Judge or as to what kind of supervision the jury should be under when it goes to view a scene such as that?

{Counsel} Your Honor, I can't state to you to an actual case name, but my understanding is that the jury is in the supervision of the courts in the general sense of the trial. And it would be a bailiff typically, with a bailiff or somebody else who works for the Judge. And they

um, they go under oath. They take an oath before they do that and so that they are you know, in care or custody of somebody that means the bailiff, and then the bailiff uh report- - reports back to the court with any problems. Defense counsel and the Prosecutor were there and that's why this issue were raised, and they were in chambers in the discussion talking about what happened. Everybody apparently agreed if you - - if you actually read those pages uh the juror said what she said. And, Defense Counsel and the Prosecutor agree with the statement that was actually made. And the point that I wanted to make there, is just that she - - she uh that meant she was saying, she indicated that all she knew at that point was that he had - - they had, she had been told that he burglarized two places. And she needed to know if those were the two houses, the two apartments, the two places. So, she...

{Judge} When - - when says she had been told by that time, by the time that the view had there been testimony uh to that affect or was the view before testimony was taken?

{Counsel} The view was before testimony was taken however when they first brought them in that morning for Voir Dire the Judge ranked the indictment.

{Judge} Okay.

{Counsel} That being aggravated murder.

{Judge} And the indictment covers both burglaries?

{Counsel} That is correct. That is correct. I mean in the interest of time, I think I better move on to the second issue, which is the um in effect of assisted of Appellate Counsel. Um, here the District Court found the appellate counsel were ineffective for three reasons. For failing to consult with their client. Or failure to provide (Inaudible) with an opportunity to provide input to appellate counsel. And then for raising the claim that we just talked about. That means the juror bias claim.

{Judge} For that reason?

{Counsel} For that reason. I- - I'm sorry if I misspoke. Um, here the question becomes we already talked about (Inaudible) but here the question becomes were appellate counsel ineffective for not raising it as an issue? Um, obviously the United States District Court in the Jones v. Barns Case stated that experienced advocates at the time in memory (Inaudible) have emphasized the importance in handing out equal arguments on appeal and focusing on one central issue if possible or at most on a few key issues. And this Honorable Court and the Meis requital Case listed eleven questions that kind of helped you answer that - - that question um, were the admitted issues significant and obvious? Were there arguably contrary (Inaudible) on the admitted issues? Were the admitted issues clearly stronger than those presented?

{Judge} So what - - what were the stronger issues that they did present? Because it seems to me that all the issues that were, that in fact were presented by these appellate counsel have all disappeared by now. Most of the - - most of the cases that we've had, you know, somebody has four strings to their bow and they're still pushing three of them and the fourth one's defaulted. And then they try to you know play ineffectiveness to bring in the fourth one but you know, this clearly now is their lead issue and it's the one they prevailed on um so you know, put yourself in their shoes. Why are the ones that they did raise uh, adequate or superior to this one?

{Counsel} Well they - - they raised uh, six issues. One of those issues being trial courts denial of motions that (Inaudible) went into affect from the Strauss affect and that means the two aggravated burglaries. I believe that that would be the strongest argument because the jury heard evidence about one burglary and then they heard evidence about another burglary that ultimately led to murder. The Prosecutor of course um, you know was saying that they were related and that there were similarities.

{Judge} But they would've been able to introduce virtually all of that evidence as similar acts evidence, wouldn't they? M. O. I mean that -- that's why we - - we usually at least all the cases that I have been on we rejected severance um...

{Counsel} I - - I think you're probably right. I'm trying to think of what all the similarities were with the you know, similarities...

{Judge} With the window tearing, cutting the uh - - cutting the hole to get in the window. Taking certain types of electronic property. Same neighborhood...

{Counsel} Right, right.

{Judge} What, two weeks apart? Something like that.

{Counsel} Um, seventeen days I believe.

{Judge} Okay.

{Counsel} Um, going back to the questions the - - the um, trial counsel passed on cause time um the bias juror claim and the trial Judge didn't find the um, the juror to be bias. So if the appellate counsel were to raise this issue on appeal; first of all it would be the court of appeals would be looking at it for plain error review. They would be um looking at the same credibility determination that the District Court should have been looking at and that this court will certainly look in providing deference to the trial Judge who was the one that was actually there observing all of this. Um, so those are the types of things that counsel needs to take into consideration when they are raising these issues. It's also important to note that counsel, you know, there are two counsel on - - on a case - - on a direct appeal case that Dusselhoff and Broomhale (Inaudible) they agree, they consulted with both trial counsel. They consulted with

the trial judge and they also consulted with another local attorney, (inaudible), in the Cincinnati area who had a significant capital case and criminal experience. As well as with a friend, who was also an attorney, a friend of Franklin's who was also an attorney uh Richard Arnold. So they consulted with all of those people um, this court should also look at...

{Judge} Consulted on what issue, issue, or issues?

{Counsel} I'm sorry.

{Judge} Consulted on what issue are you referring to?

{Counsel} They - - they read the record, they got the documents, they read the record they sat down with counsel and said what do you think on the issues on appeal. They said something to the trial Judge and said what - - what do you think. This um...

{Judge} So they were consulting on what issues to raise not so much the ethicacy of each they – they - - not how do I argue this issue?

{Counsel} Right. Just - - with - - no you as the trial counsel, what do you think is the strongest issue on appeal. You, as the trial judge, what do you think. This Richard Arnold, who's a friend of Mr. Franklin's, um, he actually attended the entire trial and then ultimately testified in litigation as well. So they consulted with him, they consulted with other people who had experience. They consulted that experience. Um, Ms. (Inaudible) had ten years of

experience um and she said about fifty to sixty percent of her practice was in the criminal (Inaudible).

{Judge} Well how much of that was on capital cases?

{Counsel} They each had um both counsel had done one capital case before (Inaudible) capital case. But the issue of juror bias is a criminal; straight criminal issues not anything that's special, um to capital cases. We'll talk about that probable qualification, it's just kind of Voir Dire in general.

{Judge} Thank you counsel your time has expired. Just a quick procedural question...I - - I won't come out of your time. I noticed that in the - - in the District Court proceedings it seemed that the case moved to an evidentiary hearing fairly promptly and then there was like a five year hiatus between that and the rendering of the appending is there any reason for that? Either in the record or from the surrounding circumstances that you know of?

{Counsel} Um, I am - - I am not aware of any uh actual reasoning for that without stating - - stating my age that is actually once I went to a hearing uh before...

{Judge} Thank you.

{Counsel} Came over from...(Inaudible)

{Judge} Thank you. Thank you. Okay. Thank you, ma'am.

{Counsel} Thank you.

{Judge} We'll have your ten minutes for rebuttal.

(Counsel II) Thank you Your Honor. May it please the court um, the District Court - - the District Court's grant of the - - on Mr. Franklin's sixth amendment violation to be affirmed. The Magistrate's uh report and recommendation was a signal to throw and the reading of the record by the Magistrate is correct, as I'il demonstrate. The first words out of this Juror Arthur's mouth in Voir Dire were in response to a group questioning by Mr. (inaudible). Mr. (inaudible) uh asked the question does anyone require uh Mr. Franklin to take the stand and testify on page, I think it's 171 of the trial transcript. The Juror said, "I do, I require him to testify to prove his innocence". Now, at this point the trial judge gives a proper explanation of the law and sets up the standards that Mr. Franklin has no burden what so ever. Despite this fact we go through uh an extremely tortured long one year where the Juror can quit the case whenever she indicates that maybe she (mistake) the law. She made seven total unequivocal statements on the record convincing her bias. Six of those opinions were after she was given one instruction by the Judge what the law was. Four times, she expressed a bias opinion after she received two instructions from the Trial Judge on what the proper law was. Three times, she gave bias opinions thinking that Mr. Franklin had proved his innocence or produced evidence to establish his innocence after she received three instructions on what the law was

by the Trial Judge. And then, finally, after the fourth instruction from the Trial Judge on that Mr. Franklin has no proof, he's not required to do anything. The juror still after getting four instructions from the Trial Judge on explaining the law that Mr. Franklin had no burden of proof, no burden of production, the juror still made two bias statements. And the last one...

{Judge} When you say bias statements, let me ask you cause this is to me kind of the crutch of the case...

{Counsel II} Yes, Your Honor.

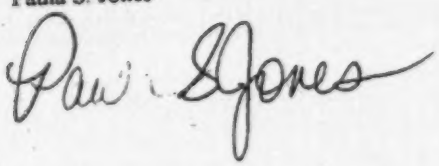
{Judge} Most of the cases, maybe even virtually all of the cases that talk about bias jurors, talk about in the con- in the context of having something against....

END OF TAPE

November 9, 2006

I, Paula S. Jones, do hereby certify that the information contained in this transcript has been transcribed to the best of my knowledge and the best of my ability.

Paula S. Jones



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Supreme Court, U.S.
FILED
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No. 06-513

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner.

v.

GEORGE T. FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INTRODUCTION

As the Warden's Petition showed, the lower courts are unsure of the difference, if any, between the "prejudice" standard used in evaluating "cause" and "prejudice" to overcome a procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and the "prejudice" standard used in weighing a claim of attorney ineffectiveness under *Strickland v. Washington*, 466 U.S. 668 (1984). The Warden's ultimate view is that *Sykes* prejudice is different from *Strickland* prejudice, so that the Sixth Circuit erred in collapsing the two. But more important, at this stage, is that the Court should address the issue to clear up the confusion.

In response, Franklin essentially admits that this question has vexed the lower courts, thus implying that the question is certworthy in the abstract, and he instead focuses on arguing that this case is a poor vehicle to resolve the issue. For example, he says that the difference does not matter because he could show *Sykes* prejudice, had he been asked to, so that resolving the question presented will not change the outcome of his case. He also insists that the Warden waived the *Sykes* prejudice issue.

While Franklin is right to implicitly concede that the issue is a real one that divides the lower courts, he is wrong in his argument that *this* case is not worthy of review. This case warrants review both because the issue is a live one that changes the outcome in Franklin's own case, and because the split below is ripe for review and should be resolved before courts decide more cases under the wrong framework.

Franklin's own case shows what happens when the *Sykes* prejudice standard is bypassed by virtue of folding it into *Strickland* prejudice. Here, Franklin did not challenge for cause at trial the juror who, according to the Sixth Circuit, was biased against him. And Franklin did not argue on direct appeal that the juror should have been excused. The Sixth Circuit nevertheless granted habeas corpus relief in the form of a new trial, holding that the ineffectiveness of Franklin's appellate counsel established both "cause" and "prejudice" to

excuse Franklin's failure to properly present his juror-bias claim to the state courts. But, as Franklin acknowledges, the appeals court allowed the showing of *Strickland* prejudice to do double-duty and to *automatically* satisfy *Sykes* prejudice without an independent, *Sykes*-specific layer of analysis.

Franklin insists that he meets any prejudice standard, and that he does so because his underlying juror-bias claim has merit—but that is precisely the problem, as his claim should not have been reviewed on the merits. The question presented here is whether a federal court may reach the "merits" of a defaulted claim in the first place. Here, the Sixth Circuit reviewed the "merits" of Franklin's juror-bias claim after finding that his appellate counsel was constitutionally ineffective by *failing* to present the claim as a ground for ordering a new trial. At the same time, Franklin further argues that he *actually presented* his juror-bias claim to the state courts as an independent ground for relief, so that, in his view, the Sixth Circuit correctly ordered a new trial as a remedy.

All of this shows that Franklin's case was directly affected by the Sixth Circuit's choice to forgo the *Sykes* prejudice analysis, and this means that the Court should review this issue in Franklin's case. Moreover, the issue was not waived here, as the Warden has consistently argued that the juror-bias claim is procedurally defaulted and that Franklin failed to demonstrate either cause or prejudice to excuse the default. Further, as explained below, Franklin's response also demonstrates, rather than refutes, the need to resolve this issue for the sake of the many pending cases that involve the question presented.

In sum, the Petition should be granted, and this important, recurring issue should be resolved.

ARGUMENT

A. The question presented does divide the lower courts, as Franklin essentially admits.

Notably, Franklin's response never denies that the question presented divides the lower courts. To the contrary, Franklin cites and quotes the Seventh Circuit's statement that it is "an open question" whether *Strickland* prejudice "would also be sufficient to establish 'prejudice' for the purpose of *Wainwright v. Sykes* cause-and-prejudice analysis." Franklin Response Opposing Petition for Writ of Certiorari ("Franklin Opp.") at 4-5, citing *Freeman v. Lane,* 962 F.2d 1252, 1259 n.5 (7th Cir. 1992). To be sure, Franklin cites the Seventh Circuit's further belief that the question did not need resolution in *Freeman,* and Franklin urges that the same is true here. The Warden, of course, disagrees on that issue, as explained in Part B below. But what is equally important, as step one, is that Franklin's focus on the vehicle-choice question is an implicit admission that the split is a real one.

Further, Franklin does not deny that this question is a recurring one. As our Petition noted, the distinction between *Stickland* prejudice and *Sykes* prejudice is important because a "gateway claim" of ineffective counsel is the "cause" that habeas petitioners invoke most often. Thus, if the Sixth Circuit's view is correct, and *Strickland* prejudice can automatically satisfy *Sykes* prejudice as well, then the *Sykes* prejudice prong evaporates in almost all cases in which a *Sykes* inquiry arises. In our view, that cannot be right. But if this view is somehow correct, then the Court should say so.

Indeed, habeas petitioners (other than Franklin) have as much interest as the States do in resolving this question. If Franklin's view is the right one, but the issue remains unclear, then some inmate might soon be improperly held to a heightened standard for *Sykes* prejudice. The better path is for the Court to clarify the rules of the road for all parties, so the Petition should be granted.

B. The issue does affect the outcome of Franklin's case, as the proper outcome turns on the standard of prejudice he must meet to excuse the default of his juror-bias claim.

Franklin essentially contends that because his juror-bias claim is meritorious, he has established "prejudice" no matter how or for what purpose "prejudice" is defined. Franklin Opp. at 2. But Franklin's argument is circular. He reasons that the Sixth Circuit properly excused his failure to present his juror-bias claim on direct appeal because the service of a biased juror required the reversal of his conviction and therefore he "wins under any interpretation of the *Sykes* prejudice test." *Id.* In other words, according to Franklin, the Sixth Circuit correctly excused his failure to present his juror-bias claim on direct appeal because it correctly held that the juror-bias claim was meritorious. *Id.* at 2-5.

Franklin's arguments beg the question presented by the Warden's petition. See *Conner v. Anderson*, 259 F. Supp. 2d 741, 766 (S.D. Ind. 2003) (petitioner's argument "begs the question of cause and prejudice by positing the asserted merits of a defaulted claim as a sufficient reason for overcoming the consequence of that default and reaching the merits."). The question presented concerns whether a federal court may consider the "merits" of a defaulted claim in the first place. As our Petition notes, the merits of a defaulted claim might be strong enough to establish ineffective assistance of appellate counsel as "cause," but the question here is whether a stronger or additional showing of "prejudice" is necessary to establish "prejudice" to excuse default of the claim.

Sykes prejudice can and should be different from *Strickland* prejudice, despite the common term "prejudice," because the uses arise in different contexts, asking different questions, and leading to different results. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court declined to

require a defendant to show, for purposes of showing ineffective assistance of counsel, that counsel's unprofessional actions more likely than not altered the outcome in the case. In so holding, the Court recognized that an "outcome-determinative" preponderance of the evidence standard "reflects the profound importance of finality in criminal proceedings." *Id.* at 693. But the Court nevertheless found that a "lower," reasonable probability standard is more appropriate for claims of ineffective assistance of trial counsel, because counsel's alleged errors call into question the reliability of the trial. *Id.* at 694.

By contrast, in the *Sykes* inquiry, the question differs, especially where, as here, the ineffectiveness that is urged as cause involves ineffective *appellate* counsel. That is, the reliability of the *trial* has not been called into question merely because the appellate lawyer was ineffective. Not only does the *Sykes* inquiry ask a different question, but equally important, the result is a different one, as it may lead to a new *trial,* without ever truly showing that the trial was unreliable. Thus, applying a stronger, outcome-determinative test for *Sykes* prejudice—i.e., to excuse a petitioner's failure to raise on direct appeal a claim of trial error—would be consistent with *Strickland*, because, in such circumstances, the petitioner is asking the federal court to vacate a presumptively valid trial verdict based on appellate error.

Franklin's case illustrates the problem. Here, in finding that Franklin's juror-bias claim was meritorious, the Sixth Circuit relied on a juror's voir dire statements. Those statements, according to the Sixth Circuit, demonstrated that she misunderstood the presumption of innocence and that she improperly required Franklin to offer proof of his innocence. Yet the Sixth Circuit acknowledged that the juror twice responded, "albeit somewhat reluctantly," that she understood that the law did not require Franklin to prove his innocence. One of these "reluctant" responses included a direct statement, in answer to a question by Franklin's

counsel, that if Franklin chose not to take the stand, "I wouldn't hold it against him." Notably, Franklin's trial counsel did not thereafter challenge the juror for cause. And the Sixth Circuit expressly found that the juror's statements during the jury view of the scene, based upon which the defense moved for a mistrial, did *not* require her to be excused. Pet. App. A at 20a, 24a, 26a.

On these facts, the Warden can show—and more important, deserves at least a chance to show—that Franklin could not meet a higher outcome-determinative test of prejudice under *Sykes*. That is, even if the Sixth Circuit was right to find this claim strong enough to meet the less-than-outcome-determinative test of prejudice to show appellate ineffectiveness, Franklin is wrong to suggest that the juror-bias claim was strong enough to meet a prejudice standard that might be (and in our view, should be) as high as showing that the claim would have been "outcome-determinative" if it had been raised by a better lawyer.

That is, this juror's responses do not demonstrate by a preponderance of the evidence that more likely than not the juror was biased against Franklin. The juror statements here were equivocal, as are the responses in nearly all record-based cases involving juror-bias claims. As the Sixth Circuit noted, a trial court's finding of juror impartiality is a question of fact that is subject to a highly deferential standard of review, even on direct appeal. That is because ambiguous and at times contradictory responses by jurors are not unusual, in view of their varying education and experience and their unfamiliarity with the judicial process. "Jurors thus cannot be expected invariably to express themselves carefully or even consistently." *Patton v. Yount*, 467 U.S. 1025, 1039 (1984).

Thus, the issue does matter here, as if the Warden can succeed in showing that *Sykes* prejudice requires more than *Strickland* prejudice, the Warden can then show that Franklin cannot clear that higher *Sykes* hurdle—and that leads to a

real-world difference in result. That is so because if Franklin cannot show actual *Sykes* prejudice at trial, then his claim of trial error remains procedurally defaulted, leaving him at most with an ineffective-appellate-counsel claim, which should at most lead to a new appeal.

Franklin mistakenly insists that this is not so, because, he says, he actually presented his juror-bias claim to the state courts in his application to reopen as a "discrete" ground for relief. That in turn means, according to Franklin, that the Sixth Circuit correctly ordered a new trial as a remedy. Franklin Opp. at 5-7. But Franklin's logic does not hold up. The Sixth Circuit held that Franklin's juror-bias claim was defaulted because he did *not* raise it on direct appeal, and the state courts thereafter refused to review the claim in post-conviction. "Thus, we must first decide whether Franklin can show cause and prejudice to excuse his procedural default." Pet. App. A at 5a.

Finally, Franklin is also wrong in arguing that "the Warden's procedural default arguments are waived." Franklin Opp. at 7. Contrary to Franklin's claim, the question presented by the Warden is properly before the Court. The Warden has consistently maintained both that Franklin's juror-bias claim is defaulted and that Franklin cannot show "cause and prejudice" to excuse the default. For example, the Warden argued in his brief to the Sixth Circuit that Franklin must demonstrate both "cause for the default and actual prejudice before the federal courts will hear the defaulted claims." See Warden's Respondent-Appellee Brief at 23. Indeed, the Warden cited *United States v. Frady*, 456 U.S. 152 (1982), in which the Court applied the *Sykes* prejudice standard. The Warden argued that "[d]emonstrating 'prejudice' requires showing a disadvantage 'infecting' the trial with constitutional error." The Warden separately cited *Murray v. Carrier*, 477 U.S. 478 (1986), for the standard for establishing the separate "cause" requirement. See Warden's Respondent-Appellee Brief at 23.

Indeed, even the Sixth Circuit's opinion contradicts Franklin's waiver argument. The Sixth Circuit acknowledged that it needed to find both cause and prejudice under *Sykes*; but had the Warden waived either prong of *Sykes,* the Sixth Circuit would have said so and resolved the issue against the Warden on that ground, instead of looking for both cause and prejudice. See Pet. App. A at 5a ("We focus on Franklin's claim of ineffective assistance of counsel, because such a claim can serve as both cause and prejudice.").

For all these reasons, the correct resolution of Franklin's case does indeed depend on the standard of prejudice he must meet to excuse the procedural default of his juror-bias claim. Thus, this case is a good vehicle to resolving this important, recurring issue.

C. Franklin's response shows that this issue is a recurring one that is important to the States.

As our Petition notes, Ohio allows for the reopening of the direct appeal to vindicate a prisoner's right to the effective assistance of appellate counsel. Franklin's juror-bias juror claim was one of thirty-three claims of error that Franklin listed in his application to reopen his appeal. Franklin asserts that the Sixth Circuit was correct in ordering a new trial because he included his juror-bias claim in his application as a "discrete" claim apart from an alleged claim of ineffective counsel. Franklin Opp. at 5. If this reasoning is allowed, this problem will only get worse, as if Franklin's approach is adopted by other petitioners, the decision below will essentially serve to encourage habeas corpus petitioners to circumvent the normal appellate process. Like Franklin, other petitioners may treat the right to seek reopening of their direct appeals as a means to present a laundry list of "discrete" claims and later obtain "merits" review in habeas corpus. Thus, the State's interest goes beyond Franklin's case.

Further, apart from the State's concerns that run against petitioners' interests, the States and habeas petitioners share a common interest in having the rules clarified, especially on the issue of what remedy—new trial or new appeal—should result. For example, in *Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004), the petitioner argued on appeal that the district court erred by failing to vacate his conviction and order a new trial, after an earlier remand by the Sixth Circuit for an evidentiary hearing concerning the effectiveness of appellate counsel. The remedy in such circumstances is an important question that will occur repeatedly. As our Petition noted, the differing treatment of this issue among the circuits could result in similarly-situated habeas petitioners receiving substantially different relief, based solely on the circuit in which they file.

CONCLUSION

For the reasons above and in our Petition, the Petition should be granted.

Respectfully submitted,

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